



1964

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Recommended Citation

Marshall J. Doke Jr., *Mistakes in Government Contracts - Error Detection Duty of Contracting Officers*, 18 Sw L.J. 1 (1964)
<https://scholar.smu.edu/smulr/vol18/iss1/1>

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Southwestern Law Journal

VOLUME 18

March 1964

NUMBER 1

MISTAKES IN GOVERNMENT CONTRACTS — ERROR DETECTION DUTY OF CONTRACTING OFFICERS

by

*Marshall J. Doke, Jr.**

I. INTRODUCTION

A. General

ONE OF the best illustrations of the development of a substantial and distinct body of law applicable to contracts with the federal government is in the area of mistakes. This development, however, has not been uniformly recognized, and indiscriminate application of common-law contract rules to mistake cases in government contracts occasionally has caused considerable confusion. State courts are having great difficulty formulating rules governing mistake cases in contracts involving the state or local governments. This difficulty is primarily attributable to their attempt to reconcile and follow precedent in *both* private and government contract law.

In the field of government contracts, the law of mistake involves the concept of fault. In most cases, the ultimate legal issue (aside from evidentiary matters) is whether or not the government contracting officer adequately discharged his error detection duty. The legal literature discussing the nature and extent of this error detection duty is extremely limited, principally because the great preponderance of precedent consists of unreported decisions of the Comptroller General of the United States. Nevertheless, it is clear that a contracting officer must have a reasonable understanding of the nature and extent of his error detection duty in order to discharge such duty consistently and adequately. Similarly, a bidder or contractor must have a reasonable understanding of the contracting officer's duty before the possibility of relief for a specific mistake can be evaluated. This Article, therefore, will discuss the contracting officer's duty in this area. The discussion is intended to serve the dual purpose of assisting contracting officers in the discharge of their

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responsibilities as well as assisting bidders and contractors to obtain relief from mistakes in situations in which the contracting officer has failed to discharge his error detection duty.

B. Federal Common Law

The choice of law with respect to the validity and construction of government contracts illustrates an area of law in which the rule of *Erie R.R. v. Tompkins*¹ is inapplicable. In the leading case on this point, the Supreme Court noted the disparities, confusions, and conflicts that would follow if the Government's general authority were subject to local controls and stated:

The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. . . .²

The nature and source of this "federal law," of course, presents an additional question. The Supreme Court has stated that in cases in which the *Erie* rule does not apply and in the absence of an applicable statute "it is for the federal courts to fashion the governing rule of law according to their own standards,"³ and that principles of "general contract law" customarily are applied to government contracts if Congress has not adopted a different standard.⁴

Although there are relatively few court decisions involving mistakes in government contracts, a substantial body of federal "common law"⁵ has developed principally from opinions of the Comp-

¹ 304 U.S. 64 (1938). The Court specifically excepted "matters governed by the Federal Constitution or by Acts of Congress. . . ." *Id.* at 78.

² *United States v. County of Allegheny*, 332 U.S. 174, 183 (1944). *Accord*, *Priebe & Sons, Inc. v. United States*, 322 U.S. 407 (1947); *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949); *United States v. Lipman*, 122 F. Supp. 284 (E.D. Pa. 1954); *Kemp v. United States*, 38 F. Supp. 568 (D.C. Md. 1941). The position of the Court of Claims on this point, until recently, has not been clear. *Compare* *Armstrong v. United States*, 144 Ct. Cl. 441, 169 F. Supp. 259 (1959), *rev'd on other grounds*, 364 U.S. 40 (1960), *with* *Houdaille Indus., Inc. v. United States*, 138 Ct. Cl. 301, 151 F. Supp. 298 (1957). The Court of Claims recently held, however, that contracts with the United States are governed by uniform federal "common law," stating: "This Court has occasionally suggested that state law applied, but in those cases the situations were distinguishable—e.g., federal law followed state law because general uniformity was not appropriate—or the statements in the opinions were inadvertent or unnecessary." *Padblook Co. v. United States*, Ct. Cl. No. 523-57 (April 5, 1963).

³ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

⁴ *Priebe & Sons, Inc. v. United States*, 322 U.S. 407, 411 (1947). The Court of Claims recently stated that "federal contract law" should take account of the best in modern decision and discussion. *Padblook Co. v. United States*, Ct. Cl. No. 523-57 (April 5, 1963).

⁵ This term is used here in reference to the growth of a substantial body of "precedent," albeit nonjudicial, recognized as authoritative by both contractors and procurement officials.

troller General of the United States, who is vested by statute with control and direction of the General Accounting Office.⁶ Although the Comptroller General's authority in this area is beyond the scope of this Article,⁷ it is generally recognized today that the Comptroller General's decisions are the most influential force in the government contract field.⁸ These decisions, for example, have far greater influence than do opinions of the Attorney General of the United States.⁹ Part of this influence results from the large volume of decisions. For example, in one year the Comptroller General decided over four hundred cases involving mistakes in bids and contracts.¹⁰

The action of the Comptroller General in deciding cases requiring an interpretation of law has been characterized as quasi-judicial.¹¹ Although the decisions are not binding upon the courts, they are cited by courts as precedent in cases involving government contracts.¹² Perhaps the principal basis for attaching greater "weight" to decisions of the Comptroller General than ordinarily would be accorded nonjudicial opinions is that the executive agencies have accepted the Comptroller General's decisions as binding upon the

⁶ The General Accounting Office (hereinafter called GAO) and the office of Comptroller General of the United States were created by the Budget and Accounting Act of 1921, 42 Stat. 20, 31 U.S.C. § 1.

⁷ In this connection, see Birnbaum, *Government Contracts: The Role of the Comptroller General*, 42 A.B.A.J. 433 (1956); Foster, *The General Accounting Office and Government Claims*, 16 J.B.A.D.C. 193, 275, 321 (1949); Langeluttig, *Legal Status of the Comptroller General of the United States*, 23 Ill. L. Rev. 556 (1929); Welch, *The General Accounting Office in Government Procurement*, 14 Fed. B.J. 321 (1954).

⁸ See Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, 70 Harv. L. Rev. 350, 357 (1956). It has been this writer's observation that many federal procurement officials attach greater significance to decisions of the Comptroller General than to judicial determinations. In the area of mistakes, the following statement has been made: "As a matter of practice, the administrative officers of the Government rarely challenge the Comptroller General's authority in this area." 2 McBride & Wachtel, *Government Contracts* § 12.10 [1] (1963).

⁹ In 1 McBride & Wachtel, *Government Contracts* § 7.80 [1] (1963), the following statement is made:

While the legality of a Government contract and the validity of bids in general would appear properly and legally to be a matter for consideration by the Attorney General of the United States as the chief law officer of the Government, apparently he has relinquished this function to the Comptroller General. In consequence, executive departments are forced in most instances to refer such cases to the Comptroller General for a decision. . . .

It has been suggested that the Comptroller General's pre-eminence in the field of government contracts results from a combination of (a) the powers conferred by the Budget and Accounting Act of 1921, 42 Stat. 20, 31 U.S.C. § 1, (b) the independence of the Comptroller General and the GAO from the executive department, and (c) the fiscal accountability of disbursing officers to the GAO. Birnbaum, *supra* note 7, at 490.

¹⁰ Welch, *Mistakes in Bids*, 18 Fed. B.J. 75 (1958).

¹¹ *Brunswick v. Elliott*, 103 F.2d 746, 750 (D.C. Cir. 1939).

¹² See, e.g., *United States v. Sabin Metal Corp.*, 151 F. Supp. 683 (S.D.N.Y. 1957); *Prestex Inc. v. United States*, — Ct. Cl. —, 320 F.2d 367 (1963); *M.F. Kemper Constr. Co. v. City of Los Angeles*, 37 Cal. App. 2d 696, 235 P.2d 7, 11 (1951).

executive branch of the Government.¹³ Consequently, procurement officials and contractors customarily refer to these decisions for guidance in resolving procurement problems and disputes. Moreover, if such decisions are binding on the executive branch, the Comptroller General's determinations with regard to the duty of government contracting officers may *establish* standards or responsibilities with which a contracting officer must comply if his actions are to be considered in "good faith."¹⁴ The courts should, it is believed, give considerable weight to the custom and practice in the field of government contracts as reflected in decisions of the Comptroller General involving the duty or obligation of a contracting officer.

C. Formation Of Government Contracts

Any analysis or discussion of mistake cases in government contracts must be based upon an understanding of the legal significance of three critical periods of time separated by two important events. These periods are: (1) before the bids are opened, (2) after the bids are opened but before award of the contract, and (3) after the award. A brief discussion of the law relating to the formation of government contracts will emphasize the significance of these periods of time and the events separating such periods. As the vast majority of cases involving mistakes arise under formal advertising procedures,¹⁵ this method will be discussed.¹⁶

¹³ In a recent case, *John Reiner & Co. v. United States*, Ct. Cl. No. 431-57 (Dec. 13, 1963), the Court of Claims stated: "[I]t is the usual policy, if not the obligation, of the procuring departments to accommodate themselves to positions formally taken by the General Accounting Office with respect to competitive bidding." This position is based upon the statutory language that the balances certified by the GAO in the exercise of its duty to settle and adjust public accounts and claims against the Government are "final and conclusive" upon the executive branch. 42 Stat. 24 (1921), 31 U.S.C. §§ 71, 74 (1958).

¹⁴ In *John Reiner & Co. v. United States*, *supra* note 13, the Court of Claims said: "He [the Comptroller General] is not confined to the minimal measure of legality but can sponsor and encourage the observance of higher standards by procuring agencies." Therefore, it can be argued that any action by a contracting officer which falls below standards established by decisions which are binding on the procuring departments could not be considered in "good faith."

¹⁵ Government contracts are divided into two categories—formally advertised contracts and negotiated contracts. The procurement statutes impose the general requirement that all contracts be let by formal advertising. See Armed Services Procurement Act of 1947, § 2(c), 10 U.S.C. § 2304(a) (1958), as amended, 10 U.S.C.A. § 2304(a) (Supp. 1962) (applicable to procurement by the Armed Services, Department of the Treasury, and the National Aeronautics and Space Administration); Federal Property and Administrative Services Act of 1949, § 302(c), 63 Stat. 377, 393, as amended, 41 U.S.C. § 252(c) (1958) (applicable to the General Services Administration and other executive agencies). Both of these statutes contain *exceptions* to this requirement and permit procurement by "negotiation" under the enumerated circumstances. See 1 McBride & Wachtel, *op. cit. supra* note 9, at § 9.

¹⁶ The principles of the federal common law relating to mistakes are applicable to negotiated as well as formally advertised procurements. See, e.g., Unpublished Decision of the Comptroller General No. B-144238, Oct. 28, 1960 (hereafter referred to as Unpub. Comp. Gen.); Unpub. Comp. Gen. B-142810, July 20, 1960; Unpub. Comp. Gen. B-138687, March 17, 1959; Unpub. Comp. Gen. B-137288, Oct. 31, 1958.

Procurement by formal advertising normally is initiated by an "Invitation For Bids" (IFB) mailed to prospective bidders and posted at the purchasing office or at some other public place. The IFB requests prospective contractors to submit sealed bids (offers) to perform work or to furnish specified supplies or service in strict accordance with specifications and contract provisions set forth in the IFB. Prospective bidders are notified that bids will be received by the procurement office until a designated hour and date at which time the bids will be publicly opened. The IFB further provides that the offer contained in the bid is irrevocable for a specified period of time.¹⁷ This departure from the rule in private contract law (that an offer ordinarily may be withdrawn at any time before acceptance¹⁸) is now an accepted principle of government contract law.¹⁹ The procurement regulations²⁰ provide that bids may be modified or withdrawn prior to the time set for public opening,²¹ but bids or

¹⁷ For example, Standard Form 33, "INVITATION, BID, AND AWARD (Supply Contract)" (Oct. 1957 ed.), provides that bids may not be withdrawn after the time set for opening. In addition, the bidder is required to *agree* that the offer will not be revoked, inasmuch as the bid itself provides:

In compliance with the above, the undersigned [bidder] offers and agrees, if this Bid be accepted within _____ calendar days (60 calendar days unless a different period be inserted by the bidder) from the date of opening, to furnish any or all of the items upon which prices are quoted . . .

¹⁸ 1 Williston, Contracts § 55 (3d ed. 1957). The common-law rule is that irrevocable offers must be supported by consideration. This rule is changed by section 2-205 of the Uniform Commercial Code which provides that "firm offers" (as defined therein) are not revocable for lack of consideration.

¹⁹ *United States v. Lipman*, 122 F. Supp. 284 (E.D. Pa. 1954); *Refining Associates, Inc. v. United States*, 124 Ct. Cl. 115, 109 F. Supp. 259 (1953); *Scott v. United States*, 44 Ct. Cl. 524 (1909); 30 Ops. Att'y Gen. 56 (1913); Unpub. Comp. Gen. B-151424, June 21, 1963; 29 Comp. Gen. 341 (1950); 19 Comp. Gen. 761 (1940). In the *Scott* case, the court suggested that the departure from the general rule was justified as a matter of public policy in view of the opportunities for collusion and fraud which otherwise would be present in the public bidding procedures. *Scott v. United States*, *supra* at 527-28. In the *Refining Associates* case, however, the court indicated that the principle may not be inconsistent with the rules applicable to private parties in view of its suggestion that the bidder receives *consideration* for the promise to keep the bid open; namely, the bidder is "accorded the right of having its bid considered on its merits . . ." *Refining Associates, Inc. v. United States*, *supra* at 262. This latter point is consistent with the court's decision in *Heyer Prods. Co. v. United States*, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956), in which it held that a bidder may recover the expenses incurred in preparing the bid if the bid is rejected in bad faith. For a general discussion of the irrevocability of bids in government contract law, see Note, *The Application of Common-Law Contract Principles in the Court of Claims: 1950 to Present*, 49 Va. L. Rev. 773, 774-76 (1963).

²⁰ Generally, military procurement is governed by the Armed Services Procurement Regulation, 32 C.F.R., pts. 1-39, 3 Gov't Cont. Rep. § 32000 (hereinafter cited "ASPR" with appropriate section number; all citations, unless otherwise indicated, are to the 1963 edition of ASPR). Procurement by nonmilitary agencies is governed by the Federal Procurement Regulation, 41 C.F.R. ch. 1, 5 Gov't Cont. Rep. § 66000 (hereinafter cited "FPR" with appropriate section number). Parallel citations to the Code of Federal Regulations are omitted for both ASPR and FPR since this source is rarely used in view of the frequent revisions to the regulations.

²¹ Modifications or withdrawals of bids may be made by written or telegraphic notice to the procurement office not later than the exact time set for opening of bids. ASPR § 2-304 (1963 ed. Rev. No. 2); FPR § 1-2.304.

modifications of bids received in the procurement office after the exact time set for opening are "late bids" which may not be considered for award except in certain limited circumstances in which the lateness is not caused by the bidder.²²

At the time specified in the invitation, bids are publicly opened and normally are read aloud to the persons present. In addition, the procurement regulations require that the names of bidders, prices bid, and other information be recorded in an "abstract of bids" which is available for public inspection except in classified procurements.²³ Thereafter follows the period of evaluation of bids. The procurement statutes permit little discretion in procurement officials with regard to the acceptance of bids.²⁴ Essentially, the evaluation consists of determining the lowest correct bid²⁵ (or highest in the case of sale of government property) that is eligible for acceptance in view of two statutory requirements; namely (1) the bidder must be *responsible*²⁶ and (2) the bid must be *responsive*²⁷ to the invitation. Occasionally, evaluation will result in the rejection of

²² ASPR § 2-303 (1963 ed. Rev. No. 2); FPR §§ 1-2.303-1 and 1-2.305.

²³ ASPR § 2-403; FPR § 1-2.403.

²⁴ Section 3(b) of the Armed Services Procurement Act of 1947, 10 U.S.C. § 2305(c) (1958), provides:

Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

²⁵ The determination of whether or not the bid is "correct" is based upon the contracting officer's exercise of his error detection duty.

²⁶ The term "responsible" is statutory. See note 24 *supra*. The criteria for responsibility are set forth in the regulations. ASPR § 1-900; FPR § 1-1.310. Generally, a determination of responsibility is based upon consideration of the prospective contractor's (1) financial resources, (2) ability to comply with the contract schedule, (3) record of performance, and (4) integrity.

²⁷ The statutory language is that the bid must *conform* to the invitation. See note 24 *supra*. A "responsive bid" is one that contains no material variances from the terms of the invitation for bids; a bid that offers something *different* from what the Government asked for in the invitation is nonresponsive. Perhaps the most frequently applied rule in government contract law is that a *substantial* deviation from the invitation for bids cannot be waived, and a bid containing such a deviation must be rejected as nonresponsive. A "substantial deviation" is defined as "one which affects either the price, quantity, or quality of the article offered." *Prestex Inc. v. United States*, ___ Ct. Cl. ___, 320 F.2d 367, 372 (1963). A contract which is awarded on a bid containing a substantial deviation from the invitation is invalid and confers no rights on the purported contractor inasmuch as such a contract, in effect, would be one issued without competitive bidding. *United States v. Ellicott*, 223 U.S. 524 (1912); *Prestex Inc. v. United States*, *supra*; *New York Mail & Newspaper Transp. Co. v. United States*, 139 Ct. Cl. 751, 154 F. Supp. 271, *cert. denied*, 355 U.S. 904 (1957). The justification for this sometimes harsh rule is that it is necessary if the purposes of formal advertising are to be attained; namely, to give everyone an equal opportunity to compete for government business, to secure fair prices, and to prevent fraud. See *Prestex Inc. v. United States*, *supra*. The regulations do, however, permit the waiver of minor informalities or irregularities in bids as defined therein. ASPR § 2-405 (1963 ed. Rev. No. 3); FPR § 1-2.405. For a general discussion of nonconforming bids, see Navy Contract Law §§ 2.27-2.32 (2d ed. 1959).

all bids; for example, if the price or even the lowest acceptable bid is considered unreasonable.²⁸

Offers contained in bids are accepted by the Government by an "award" of the contract. The only statutory requirement for an award is that it be made by "written notice" to the bidder.²⁹ Most government bid forms provide that the bid will be accepted by mailing or otherwise furnishing a written award to the successful bidder.³⁰ Customarily, acceptance of the bid is made by a written "notice of award" contained in a letter or telegram; this is followed by a formal award document.³¹ Since the award is an acceptance of the bid or offer, the contract comes into existence on the effective date of the award, and the bid and the award constitute the contract.³² At the present time, the federal common law is unclear with respect to the effective date of an award of a government contract. In the law of private contracts, the traditional rule is that a binding contract comes into existence upon deposit of the acceptance in the mail.³³ However, the Court of Claims has rejected this rule and holds that an acceptance takes effect only when it is actually communi-

²⁸ Circumstances permitting the rejection of all bids and cancellation of the invitation are set forth by regulation. ASPR § 2-404; FPR § 1-2.404-1. Other circumstances include (a) where supplies or services are no longer needed, (b) deficient specifications, and (c) collusive bids. See Navy Contract Law § 2.26 (2d ed. 1959).

²⁹ See note 24 *supra*.

³⁰ This provision is found either in the bidder's agreement to keep the bid open or in the "Terms and Conditions of the Invitation for Bids," which is part of the form. Standard Form 21, "BID FORM (Construction Contract)" (Jan. 1961 ed.), ASPR F-100.21, contains this statement: "The undersigned [bidder] agrees that, upon written acceptance of this bid, mailed or otherwise furnished within _____ calendar days" (Emphasis added.) Paragraph 8(d) of the "Terms and Conditions of the Invitation for Bids" of both Standard Form 30, "INVITATION AND BID (Supply Contract)" (Oct. 1957 ed.), ASPR F-100.30, and Standard Form 33, "INVITATION, BID, AND AWARD (Supply Contract)" (Oct. 1957 ed.), ASPR F-100.33, provides: "A written award mailed (or otherwise furnished) to the successful bidder within the time for acceptance specified in the bid shall be deemed to result in a binding contract without further action by either party." (Emphasis added.) There is no provision for the manner of acceptance of the bid contained in Standard Form 19, "INVITATION, BID, AND AWARD (Construction, Alteration or Repair)" (Jan. 1959 ed.), ASPR F-100.19.

³¹ Section 2-407.1 of ASPR provides that awards shall be made by mailing or otherwise furnishing to the bidder an award document or a notice of award on such form as may be prescribed by the procuring activity. This section does require, however, that when a notice of award is issued it shall be followed as soon as possible by the "formal award." In addition, § 16-101.2(c) of ASPR expressly permits the use of informal award documents, including telegrams, as notices of awards of supply contracts.

³² See *United States v. Purcell Envelope Co.*, 249 U.S. 313 (1919); 33 Comp. Gen. 180 (1953); 20 Comp. Gen. 530 (1941). Section 2-407.1 of ASPR provides: "All provisions of the invitation for bids, including any acceptable additions or changes made by a bidder in the bid, shall be clearly and accurately set forth (either expressly or by reference) in the award document, since the award is an acceptance of the bid, and the bid and the award constitute the contract."

³³ 1 Williston, *op. cit. supra* note 18, at §§ 81-86. For a recent decision which followed the traditional rule after a lengthy discussion of the views of advocates and critics of the "rule of *Adams v. Lindsell*," see *Morrison v. Thoeke*, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963).

cated to the offeror.³⁴ The basis for this rejection was that the change in the postal regulations (which now allow a sender to withdraw a letter from the mail) eliminated the rationale of the earlier cases.³⁵ The Comptroller General, however, has followed the traditional rule that the acceptance is effective when the award is mailed.³⁶ The importance of this unresolved problem is that whichever rule is applied could very well determine whether or not relief will be granted in a mistake case.³⁷ It is suggested that since most government bid forms prescribe the manner of acceptance,³⁸ the award of contracts based upon bids submitted on these forms should be effective when mailed since this is a manner of acceptance that has been *designated by the offeror*.³⁹

³⁴ *Pacific Alaska Contractors, Inc. v. United States*, 141 Ct. Cl. 303, 157 F. Supp. 844 (1958); *Slobojan v. United States*, 136 Ct. Cl. 620 (1956); *Rhode Island Tool Co. v. United States*, 130 Ct. Cl. 698, 128 F. Supp. 417 (1955); *Dick v. United States*, 113 Ct. Cl. 94, 82 F. Supp. 326 (1949).

³⁵ For a general discussion, see Note, *The Application of Common-Law Contract Principles in the Court of Claims: 1950 to Present*, *supra* note 19, at 776-77. See also 2 McBride & Wachtel, *op. cit. supra* note 8, at § 11.30.

³⁶ 35 Comp. Gen. 272 (1955). *Accord*, *United States v. Sabin Metal Corp.*, 151 F. Supp. 683 (S.D.N.Y. 1957); see also 38 Comp. Gen. 876 (1959). Language in a recent decision, however, suggests otherwise. In Unpub. Comp. Gen. B-150461, Dec. 27, 1962, the bidder alleged error after acceptance of the bid but before receipt of notice of award. The decision stated: "[S]ince [the mistake] was asserted before receipt of notice of award it is believed that to insist upon performance, under the attending facts and circumstances, would be improper."

³⁷ The choice of rules could determine whether the case involved a mistake in *bid* or a mistake in *contract*. See note 72 *infra* and accompanying text. For example, in one reported decision the mistake was alleged after the award was mailed but before the award was received. 39 Comp. Gen. 36, *on reconsideration*, 39 Comp. Gen. 405 (1959). The Comptroller General, possibly in view of the decisions of the Court of Claims (see note 34 *supra*), decided the case on an alternate basis and avoided a decision on whether the acceptance was effective when mailed or received.

³⁸ See note 30 *supra* and accompanying text.

³⁹ As stated in 1 Williston, *op. cit. supra* note 18, at § 76: "Not only may the offeror dictate the consideration which he demands as the return for the promise in his offer, but he may also dictate the way in which acceptance shall be indicated." *Accord*, Restatement, Contracts § 61 (1932). The bid forms are written by the Government, but when a bid is submitted on such a form, the provisions on the form become the terms of the bidder (offeror). The following and similar provisions found in some invitations for bids leave no doubt as to the time procurement officials deem acceptance to be effective:

Attention is directed to paragraph 8(d) of the Terms and Conditions of the Invitation for Bids, which provides that a written award mailed or otherwise furnished to the successful bidder results in a binding contract. Any award hereunder, or a preliminary notice thereof, will be mailed or otherwise furnished to the bidder the day the award is dated. Therefore, in computing the time available for performance, the bidder should take into consideration the time required for the notice of award to arrive through the ordinary mails. However, a bid offering delivery based on date of receipt by the contractor of the contract or notice of award (other than the contract date) will be evaluated by adding the maximum number of days normally required for delivery of the award through the ordinary mails. If, as so computed, the delivery date offered is later than the delivery date required in the Invitation, the bid will be considered as nonresponsive and rejected.

Invitation For Bids No. 600-254-64 issued 26 Sept. 1963 by the U.S. Navy Purchasing Office, Washington 25, D.C. at 29.

The importance of the two significant events mentioned previously—bid opening and award—relates to the period in which a mistake may be discovered and alleged. If a mistake is discovered before the bids are opened, the bidder has the power and right to provide his own remedy by modifying or withdrawing the bid.⁴⁰ In this Article, a mistake alleged by a bidder after opening but prior to award is called a mistake in *bid*, whereas an error alleged after award is called a mistake in *contract*. As discussed hereafter, the problems involved and applicable rules vary greatly between mistakes in bids and mistakes in contracts.

One final rule relating to the formation of government contracts should be mentioned; namely, only duly authorized *contracting officers* have authority to bind the Government in contract,⁴¹ and then only to the extent of their *actual* authority.⁴² This rule may be particularly important in mistake cases in which issues of intent, duty, constructive notice, and good faith are involved.

II. MISTAKES

A. General

There is probably no area of contract law in which legal labels are more abundant or confusing than the area of mistakes. Mistakes have been classified as unilateral and mutual, remedial and unremedial, palpable and impalpable, of law and of fact, and in combinations thereof.⁴³ The scope of this Article is limited to a consideration of mistake cases that involve the error detection duty of contracting officers. These cases involve a mistake by one party—the bidder or contractor—that is neither induced nor shared by the Government but for which some type of relief may be warranted.⁴⁴

⁴⁰ See note 21 *supra* and accompanying text and note 174 *infra* and accompanying text.

⁴¹ *Bausch & Lomb Optical Co. v. United States*, 78 Ct. Cl. 584 (1934).

⁴² The doctrine of apparent authority may not be invoked against the Government since contractors who deal with contracting officers are *presumed* to know their actual authority as defined by statute or regulation. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *United States v. Zenith-Godley Co.*, 180 F. Supp. 611 (S.D.N.Y. 1960); *Gay Street Corp. v. United States*, 130 Ct. Cl. 341, 127 F. Supp. 585 (1955). See also 1 McBride & Wachtel, *op. cit. supra* note 9, at § 5.10 [3]; McIntire, *Authority of Government Contracting Officers: Estoppel and Apparent Authority*, 25 Geo. Wash. L. Rev. 162 (1957).

⁴³ See Lubell, *Unilateral Palpable and Impalpable Mistake in Construction Contracts*, 16 Minn. L. Rev. 137 (1932); Patterson, *Equitable Relief for Unilateral Mistake*, 28 Colum. L. Rev. 859 (1928).

⁴⁴ This type of mistake is often labeled as unilateral since the mistake was made by only one party to the contract. If the other party to the contract knew or should have known of the other party's mistake before the contract was consummated, the mistake has been labeled either (a) unilateral which should be treated as mutual or (b) mutual. See note 43 *supra*.

Cases involving mutual mistakes⁴⁵ or circumstances in which the Government induces or contributes to the other party's error⁴⁶ will not be discussed.

The general rule in government contract law is that if a bidder has made a mistake in the submission of a bid that was neither induced nor shared by the Government and the bid has been accepted, the bidder must bear the consequences of the mistake unless the contracting officer knew or should have known of the existence of the mistake at the time the bid was accepted.⁴⁷ The correlative rule is that acceptance of a bid by a contracting officer who has either actual or constructive knowledge of error therein does not give rise to a valid and binding contract.⁴⁸ This rule is founded upon principles of good faith; that is, an "offeree will not be permitted to snap up an offer that is too good to be true; no agreement based on such an offer can then be enforced by the acceptor."⁴⁹ In cases in which a contracting officer has accepted a bid while on notice, either actual or constructive, of the possibility of error in such bid, it is *presumed* that the contracting officer exercised bad faith or attempted to take

⁴⁵ See, e.g., *Ackerlind v. United States*, 240 U.S. 531 (1916); *Panama Power & Light Co. v. United States*, 150 Ct. Cl. 290, 278 F.2d 939 (1960); *Sutcliffe Storage & Warehouse Co. v. United States*, 125 Ct. Cl. 297, 112 F. Supp. 590 (1953); Unpub. Comp. Gen. B-148147, April 17, 1962; 30 Comp. Gen. 220 (1950). See also Unpub. Comp. Gen. B-143861, Sept. 16, 1960, stating that the contract transaction was entered into with an "erroneous understanding on the part of the contractor and the Government . . ."

⁴⁶ The Government's contribution to the mistake usually involves erroneous or misleading drawings or specifications. See Unpub. Comp. Gen. B-147842, Feb. 2, 1962 (misleading specifications); Unpub. Comp. Gen. B-144860, Feb. 9, 1961 (error in scale of government drawing); Unpub. Comp. Gen. B-144262, Nov. 15, 1960 (ambiguous specifications); 37 Comp. Gen. 532 (1958) (misprint in specification). The Government also is liable for damage attributable to misstatements of fact in a contract or specifications which are representations made to the contractor. See *Flippen Materials Co. v. United States*, ___ Ct. Cl. ___, 312 F.2d 408 (1963) and cases cited therein. The courts also hold that the Government's *withholding* of relevant information from a contractor prior to award is actionable as a breach of contract. *Snyder-Lynch Motors, Inc. v. United States*, ___ Ct. Cl. ___, 292 F.2d 907 (1961); *Bateson-Stolte, Inc. v. United States*, 145 Ct. Cl. 387, 172 F. Supp. 454 (1959); *Ragonese v. United States*, 128 Ct. Cl. 156, 120 F. Supp. 768 (1954).

⁴⁷ *United States v. Sabin Metal Corp.*, 151 F. Supp. 683 (S.D.N.Y. 1957); *Saligman v. United States*, 56 F. Supp. 505 (E.D. Pa. 1944); *Dougherty v. United States*, 102 Ct. Cl. 249 (1944); Unpub. Comp. Gen. B-138912, March 18, 1959; 20 Comp. Gen. 652 (1941). As the court stated in *Allied Contractors, Inc. v. United States*, ___ Ct. Cl. ___, 310 F.2d 945, 946 (1962): "There is no doubt that plaintiff made a mistake, but there can be no recovery unless defendant [Government] was aware of the fact that it had done so. A contract, of course, will not be reformed for a unilateral mistake."

⁴⁸ *C.N. Monroe Mfg. Co. v. United States*, 143 F. Supp. 449 (E.D. Mich. 1956); *Kemp v. United States*, 38 F. Supp. 568 (D.C. Md. 1941); Unpub. Comp. Gen. B-151424, June 21, 1963; Unpub. Comp. Gen. B-147368, Jan. 12, 1962; 38 Comp. Gen. 678, 683 (1959); 37 Comp. Gen. 706 (1958); 36 Comp. Gen. 441 (1956).

⁴⁹ 1 Williston, *op. cit. supra* note 18, at § 94. See Navy Contract Law § 2.20 (2d ed. 1959); Restatement, Contracts § 71(c) (1932). See also *Alabama Shirt & Trouser Co. v. United States*, 121 Ct. Cl. 313, 331 (1952) (stating that the Government could not be charged with having snapped up an advantageous offer made by mistake); *Hyde Park Clothes, Inc. v. United States*, 114 Ct. Cl. 424, 435, 84 F. Supp. 589, 592 (1949).

advantage of the bidder.⁵⁰ This presumption of bad faith may be rebutted if before award the contracting officer gives the bidder an opportunity to review and recheck the bid by requesting the bidder to confirm or verify the bid.⁵¹ If the contracting officer has fulfilled his responsibilities in obtaining a verification of the bid,⁵² an acceptance of the bid ordinarily⁵³ will preclude relief for mistake⁵⁴ unless the contracting officer was still in fact suspicious that the bid contained an error.⁵⁵ The development of the federal common law has consisted generally of an effort to prevent contracting officers from snapping up erroneous bids without requiring them to act as a "nursemaid" for bidders.⁵⁶

B. Nature Of Mistake

The legal definition of "mistake" is a state of mind that is not in

⁵⁰ 27 Comp. Gen. 17 (1947); 23 Comp. Gen. 596 (1944); 18 Comp. Gen. 942 (1939). The general rule is sometimes stated in these terms: "Acceptance of a bid consummates a valid contract unless the officer accepting it was on notice, either actual or constructive, of such circumstances as would make the acceptance *an act of bad faith*." Unpub. Comp. Gen. B-138804, March 13, 1959. (Emphasis added.)

⁵¹ Unpub. Comp. Gen. B-149350, Sept. 21, 1962; Unpub. Comp. Gen. B-147341, Nov. 7, 1961; Unpub. Comp. Gen. B-138798, March 16, 1959; 36 Comp. Gen. 27 (1956); Welch, *supra* note 10, at 84. The rule is usually stated in the following terms: "The fact that the acceptance of the bid was not made until after the company had been given an opportunity to verify its bid, precludes any assumption that the contracting officer exercised bad faith or attempted to take advantage of the company." 27 Comp. Gen. 17, 19-20 (1947). In *Alabama Shirt & Trouser Co. v. United States*, 121 Ct. Cl. 313 (1952), the court noted that the bidder had been warned of a possible mistake in its bid and stated: "In the circumstances, we think the plaintiff cannot charge the Government with having snapped up an advantageous offer made by mistake." *Id.* at 331.

⁵² A detailed discussion of the contracting officer's duty and responsibilities in this regard is contained in section IV of this Article *infra* entitled "Verification."

⁵³ See notes 197-99 *infra* and accompanying text.

⁵⁴ Unpub. Comp. Gen. B-151735, Sept. 11, 1963; Unpub. Comp. Gen. B-149350, Sept. 21, 1962; Unpub. Comp. Gen. B-147341, Nov. 7, 1961; Unpub. Comp. Gen. B-145369, April 11, 1961; 37 Comp. Gen. 786 (1958); 27 Comp. Gen. 17 (1947).

⁵⁵ See note 169 *infra* and accompanying text. The Comptroller General has recognized that an award should not be made, even after verification, if the contracting officer still suspects that the bid contains an error. In one case, relief was granted since the contracting officer believed that he had no alternative but to make an award after the bidder's verification of the bid; the decision stated: "In view of the contracting officer's belief that the price quoted was erroneous, despite the verification, the contract involved may accordingly be cancelled without liability to the company." Unpub. Comp. Gen. B-144165, Oct. 12, 1960. In a similar decision, it was stated: "In the circumstances, to hold that the contractor is bound by its erroneous bid when the procuring officials were suspicious of error up to and including the time of award could hardly be regarded as an act of good faith on the part of the Government." Unpub. Comp. Gen. B-139435, May 14, 1959. The Army Procurement Procedures ("APP") also expressly recognizes the contracting officer's responsibility in such circumstances: "Where the initial confirmation of a bid by a bidder does not dispel the suspicion of an error, the contracting officer should take such further action as is reasonably necessary to apprise the bidder of the suspected error." APP § 2-406.3(b) (Rev. No. 26, 1960).

⁵⁶ In *Saligman v. United States*, 56 F. Supp. 505, 507 (E.D. Pa. 1944), the court said: "I must agree with the defendant that the government is not obligated to act as a 'nursemaid' for bidders when the price is 'in line'."

accord with the facts.⁵⁷ In contract law, however, the mental attitude must be coupled with some act having legal significance before it acquires legal consequences.⁵⁸ For the purposes of government contract law, therefore, any element of an offer or bid that is based upon a state of mind of the bidder that is not in accord with facts existing at the time the bid is submitted apparently would be considered a mistake. There has been little discussion by the courts or the Comptroller General concerning the types of mistakes or errors in government contract law that will provide a basis for some type of relief, except for statements that the error or mistake must be bona fide.⁵⁹ Therefore, useful guidance generally can be obtained only from specific cases in which relief has been granted for mistake.⁶⁰

There is one category of cases that has caused a great deal of confusion and inconsistency in the office of the Comptroller General with respect to whether a mistake was in fact made. This category of cases involves a mistake of a bidder that is attributable to the bidder's supplier or subcontractor. In *Kemp v. United States*,⁶¹ the

⁵⁷ Restatement, Contracts § 500 (1932); 5 Williston, Contracts § 1535 (Rev. ed. 1937).

⁵⁸ *Russel & Pugh Lumber Co. v. United States*, — Ct. Cl. —, 290 F.2d 938, 941 (1961); 5 Williston, *op. cit. supra* note 57.

⁵⁹ See, e.g., Unpub. Comp. Gen. B-150593, Jan. 28, 1963; Unpub. Comp. Gen. B-145726, May 12, 1961; 35 Comp. Gen. 279 (1955); 20 Comp. Gen. 286 (1940); 17 Comp. Gen. 575 (1938). This requirement apparently means only that there must be an actual or genuine mistake honestly made. As applied, the term probably means only that the bidder or contractor must be able to *prove* that a mistake was made. See *Brister & Koester Lumber Corp. v. United States*, 116 Ct. Cl. 824, 90 F. Supp. 695 (1950), and *Leitman v. United States*, 104 Ct. Cl. 324, 60 F. Supp. 218 (1945), for illustrations of the type of case necessitating this requirement.

⁶⁰ The following decisions illustrate the categories of mistakes for which relief has been granted: (a) *Typographical errors*: Unpub. Comp. Gen. B-145726, May 12, 1961; Unpub. Comp. Gen. B-137083, Sept. 26, 1958; 37 Comp. Gen. 654 (1958) (error in transcribing prices from worksheets to bid form); (b) *Error in computation*: Unpub. Comp. Gen. B-151963, Aug. 16, 1963; Unpub. Comp. Gen. B-149846, Oct. 30, 1962; Unpub. Comp. Gen. B-135046, Feb. 6, 1958; Unpub. Comp. Gen. B-134428, Jan. 16, 1958; (c) *Omission of cost of equipment, task, material, or labor*: *C.N. Monroe Mfg. Co. v. United States*, 143 F. Supp. 449 (E.D. Mich. 1956); Unpub. Comp. Gen. B-148481, April 3, 1962; Unpub. Comp. Gen. B-146484, Aug. 2, 1961; Unpub. Comp. Gen. B-144238, Oct. 28, 1960; 38 Comp. Gen. 504 (1959); (d) *Bid based on wrong material or equipment*: *Rhode Island Tool Co. v. United States*, 130 Ct. Cl. 698, 128 F. Supp. 417 (1955); Unpub. Comp. Gen. B-147090, Dec. 21, 1961; Unpub. Comp. Gen. B-142981, Dec. 6, 1960; (e) *Misinterpretation of specifications*: Unpub. Comp. Gen. B-152453, Oct. 7, 1963; Unpub. Comp. Gen. B-147647, Dec. 27, 1961; Unpub. Comp. Gen. B-144300, Nov. 4, 1960; Unpub. Comp. Gen. B-143144, July 5, 1960; Unpub. Comp. Gen. B-128997, Sept. 10, 1956; (f) *Bid based on wrong specification*: Unpub. Comp. Gen. B-143995, Sept. 23, 1960; 37 Comp. Gen. 398 (1957); (g) *Wrong unit used in computing bid*: Unpub. Comp. Gen. B-138272, Jan. 19, 1959; Unpub. Comp. Gen. B-137297, Oct. 8, 1958; (h) *Miscellaneous*: Unpub. Comp. Gen. B-145192, March 16, 1961 (wrong price due to use of obsolete catalog); Unpub. Comp. Gen. B-145027, Feb. 27, 1961 (bid was for different procurement); Unpub. Comp. Gen. B-129514, Nov. 29, 1956 (bidder mistakenly believed most parts could be manufactured, whereas they had to be purchased in open market); Unpub. Comp. Gen. B-128819, Sept. 10, 1956 (bid on wrong item).

⁶¹ 38 F. Supp. 568 (D.C. Md. 1941).

contractor placed an order with its supplier after the contract was awarded, but the supplier advised that its previous quotation (which the contractor used in preparing the bid) was in error. The contractor alleged a mistake and initially sought relief from the Comptroller General. The Comptroller General denied relief stating that there was no mistake in the bid since the bid was exactly as intended by the bidder and the acceptance was as intended by the contracting officer.⁶² The Court of Claims, however, specifically rejected the Comptroller General's position⁶³ and granted relief. The Court of Claims previously had authorized relief for a mistake based upon a misinterpretation of a supplier's quotation.⁶⁴ In 1959, the Comptroller General expressly rejected any argument that an error attributable to a contractor's supplier is not a mistake.⁶⁵ Nevertheless, the Comptroller General has denied relief in subsequent cases stating or suggesting that there was no "mistake" in such circumstances since the bid was exactly as intended by the bidder;⁶⁶ in other cases,

⁶² 19 Comp. Gen. 168, 170-71 (1939).

⁶³ 38 F. Supp. at 571.

⁶⁴ *Alta Elec. and Mechanical Co. v. United States*, 90 Ct. Cl. 466 (1940).

⁶⁵ In 38 Comp. Gen. 517 (1959), it was stated:

While it is true that an error in a supplier's quotation is not sufficient, by itself, to authorize relief from a contract entered into on the basis of that quotation, the fact that the error may be due to the contractor's supplier is not to be considered as a bar to relief if the attendant circumstances are such that it cannot be said that the acceptance of the bid was in good faith, without actual or constructive notice of the probability of error. The fact that the error was made by the contractor's supplier properly can be used only as an additional reason to show that the acceptance was in good faith in cases where there was nothing to place the contracting officer on notice of the probability of error. The reason for this is that the contracting officer, in the absence of other circumstances, may not be charged with constructive notice of the supplier's error when the contractor itself, who is a regular dealer in such supplies, did not see fit to question the correctness of its supplier's quotation prior to quoting such price to the Government. *Id.* at 519.

Similar reasoning was used in a later decision in which it was stated: "[I]f the [contractor], well experienced in construction work, was not put on notice of probable error in the low prices quoted . . . by its subcontractor, then certainly the Government was in no better position to determine the correctness of the [contractor's] bid on that item. . . ." Unpub. Comp. Gen. B-139438, May 25, 1959.

The reasoning used by the Comptroller General in the quoted statements is questionable. First, a contracting officer is never (as indicated in the first quotation) charged with constructive notice of a *supplier's* error. The contracting officer may only be charged with constructive notice of error in the bid submitted to the Government. Second, if the contracting officer is on constructive notice of error in the bid to the Government because of "other circumstances" (e.g., disparity in bids), his advice to the bidder of this fact in obtaining verification may be all that would be necessary to enable the bidder to discover the supplier's error.

⁶⁶ Unpub. Comp. Gen. B-146386, Sept. 28, 1961; Unpub. Comp. Gen. B-146253, July 14, 1961; Unpub. Comp. Gen. B-144490, Jan. 9, 1961; Unpub. Comp. Gen. B-143802, Sept. 1, 1960; Unpub. Comp. Gen. B-138687, March 17, 1959. If there is no "mistake" in cases in which the amount of the bid is based upon an erroneous quotation by a supplier, then the bidder's discovery of the error even before award theoretically would not justify withdrawal of the bid. It is extremely doubtful that any court would permit such a result.

relief has been granted in such situations without discussing the point.⁶⁷

The subjective approach concerning what the bidder "intended" logically would be applicable to errors caused by misinterpretation of the specifications or other factors involved in cases in which relief has been granted.⁶⁸ This approach, however, fails to recognize that a mistake, by definition, is a "state of mind"⁶⁹ and confuses the question of whether or not a mistake occurred with the issue of whether or not relief will be granted for the mistake.⁷⁰ In view of the "fault" concept of relief in government contract mistake cases,⁷¹ it is difficult logically to reconcile why the action of a contracting officer in accepting a bid, if he has constructive notice of the possibility of error, would be in bad faith if the error is caused by the bidder but would be in good faith if the error was caused by the bidder's supplier.

C. Allegation Of Error

The most important factor in mistake cases is *when* the error is alleged—before or after award—because this factor is used to distinguish between "mistake in bids" and "mistake in contract." Generally, a determination of what the contracting officer knew or should have known at the time the bid was accepted also determines whether or not any relief from the mistake is available. Thus, the importance of when the error is alleged is apparent; if the error is alleged before award, all questions or issues of constructive notice are immaterial since the contracting officer has *actual* notice of error,⁷² and in such

⁶⁷ Unpub. Comp. Gen. B-148120, Feb. 27, 1962; Unpub. Comp. Gen. B-144252, Oct. 20, 1960; Unpub. Comp. Gen. B-143436, July 22, 1960. In one case, the bidder *misinterpreted* the supplier's quotation, and relief was granted. Unpub. Comp. Gen. B-146413, Aug. 1, 1961.

⁶⁸ See cases cited in note 60 *supra*. In one case, the Comptroller General did indicate that error caused by misinterpretation of specifications was not a "mistake"; he stated: "Had the contracting officer inquired if you intended to bid \$.7189 per pound, your answer could only have been that you did intend that price." Unpub. Comp. Gen. B-148412, May 9, 1962. Nevertheless, relief was granted on reconsideration of this decision. Unpub. Comp. Gen. B-148412, Aug. 13, 1962.

⁶⁹ See note 57 *supra* and accompanying text.

⁷⁰ See 5 Williston, *op. cit. supra* note 57. In 31 Comp. Gen. 323 (1952), relief was denied where the bidder sought a price increase because of a *change* (as distinguished from an error) in its supplier's quotation. The Comptroller General stated that it was the bidder's responsibility to get firm quotations from suppliers and that no basis for relief existed if a supplier increases its price subsequent to the date on which the bid was submitted.

⁷¹ See note 50 *supra* and accompanying text.

⁷² See Unpub. Comp. Gen. B-144233, Oct. 25 1960 (sales case). The contractor had verbally notified the contracting officer prior to award that the bid was in error. The opinion stated:

Aside from any notice of error which might be imputed to the property disposal officer from the unusually high bid submitted by the contractor, it is reported that he had actual notice of the error prior to his acceptance of the bid and award of the contract. Under such circumstances, a valid and binding contract was not consummated by the acceptance of the contractor's bid

situations, the general rule is that acceptance of the bid will not result in a valid and binding contract.⁷³ However, an exception to this rule exists if the bidder is given an opportunity before award to submit evidence of the error and he fails to submit such evidence⁷⁴ or unreasonably delays in doing so.⁷⁵ The Comptroller General has stated the legal effect of an allegation of error prior to award in these terms: "In undertaking to bind a bidder by acceptance of a bid after notice of a claim of error by the bidder, the Government virtually undertakes the burden of proving either that there was no error or that the bidder's claim was not made in good faith. . . ."⁷⁶ The relief available to a bidder when an allegation of error is made prior to award and the evidence necessary to obtain such relief will be discussed subsequently.⁷⁷

In cases in which an error is alleged before award, the contracting officer's duty or responsibility is quite simple; he requests the bidder to submit evidence of the mistake which, together with the contracting officer's report, is forwarded to higher headquarters for a determination.⁷⁸ The extent of the contracting officer's responsibility is not so clear in cases in which error is alleged after award. In these instances, the contracting officer has no *actual* notice of error.⁷⁹ It

⁷³ Unpub. Comp. Gen. B-147949, Feb. 2, 1962; 38 Comp. Gen. 678 (1959); 36 Comp. Gen. 641 (1957); 17 Comp. Gen. 536 (1937). The rule has been applied when the bidder made no allegation of error but merely advised the contracting officer, in effect, that he "suspected the possibility of an error" (Unpub. Comp. Gen. B-144054, Oct. 17, 1960), and when the allegation of error was made after verification. (Unpub. Comp. Gen. B-143995, Sept. 23, 1960). The courts have held that a bidder has a *right* to withdraw a bid containing a mistake if the error is alleged before award. See note 174 *infra* and accompanying text.

⁷⁴ Unpub. Comp. Gen. B-146056, June 28, 1961.

⁷⁵ 38 Comp. Gen. 218 (1958). This case held that a period of five days after the bidder "expressed doubt orally as to the correctness of its bid" afforded the bidder a reasonable opportunity to allege error unequivocally and submit evidence in substantiation thereof. *But see* Unpub. Comp. Gen. B-144054, Oct. 17, 1960, in which it was held that an award should not have been made without verification after the bidder advised the contracting officer of the possibility of error even though the bidder failed, in the ensuing eleven days before award, to allege error.

⁷⁶ 36 Comp. Gen. 441, 444 (1956).

⁷⁷ See section V of this Article *infra* entitled "Relief."

⁷⁸ ASPR § 2-406.3; FPR § 1-2.406-3.

⁷⁹ If the contracting officer is, in fact, suspicious of error at the time of award (even though error has not been alleged and the circumstances do not charge him with constructive notice of error), it might be argued that the contracting officer had actual notice of the possibility of error in the bid. See note 55 *supra*. A situation of this type, however, would be virtually impossible to prove unless the information was volunteered by the contracting officer or a record was made by the contracting officer of such suspicion which could be obtained through discovery procedures. In Unpub. Comp. Gen. B-144843, March 9, 1961 (sales case), the Comptroller General granted relief since the contracting officer had doubts about the accuracy of the high bid and would have requested a verification if the bidder had been present at the opening.

is clear that the contracting officer has the responsibility to examine all bids for mistakes,⁸⁰ but beyond this essential requirement, any determination of whether the contracting officer fulfilled his responsibility (*i.e.*, acted in good faith) involves a consideration of two factors—constructive notice and verification.

III. CONSTRUCTIVE NOTICE

A. Meaning

In the great majority of cases involving mistakes alleged after award, the ultimate decision depends entirely upon the resolution of one issue; namely, was the contracting officer on constructive notice of the possibility of error at the time of award? The law of "constructive notice" in government contract mistake cases has been developed almost exclusively by the Comptroller General. Unfortunately, most of this "law" is contained in unpublished decisions which are not readily available to contracting officers or attorneys. Perhaps for this reason, there has been little discussion by legal writers of the meaning of the term, the factors or circumstances sufficient to constitute constructive notice, or its effect. The cases do permit a limited degree of analysis, although general rules and criteria are not established clearly.

Generally speaking, "constructive notice" is a legal inference drawn from established facts,⁸¹ or expressed another way, it is the legal substitute for actual notice.⁸² As used by the Comptroller General, "constructive notice" in government contract mistake cases is said to exist when the contracting officer, considering all facts and circumstances, should have known of the possibility,⁸³ probability,⁸⁴

⁸⁰ The procurement regulations provide: "After the opening of bids, contracting officers shall examine all bids for mistakes." ASPR § 2-406.1; FPR § 1-2.406-1. This responsibility also arises from application of the principle of government contract law that a contracting officer's acceptance of a bid will be presumed to be in bad faith if he should have known of the possibility of error in the bid.

⁸¹ *The Tompkins*, 13 F.2d 552, 554 (2d Cir. 1926).

⁸² *Industrial Loan & Thrift Corp. v. Swanson*, 223 Minn. 346, 26 N.W.2d 625 (1947); *In re Fahle's Estate*, 105 N.E.2d 429, 431 (Ct. App. Ohio 1950).

⁸³ For cases using the term "possible" error or "possibility" of error, see, *e.g.*, Unpub. Comp. Gen. B-150707, April 15, 1963; Unpub. Comp. Gen. B-150593, Jan. 28, 1963; Unpub. Comp. Gen. B-146649, Oct. 31, 1961; Unpub. Comp. Gen. B-145144, March 21, 1961; 40 Comp. Gen. 326 (1960); Unpub. Comp. Gen. B-143942, Sept. 20, 1960; 39 Comp. Gen. 405 (1959) (also using term "probable").

⁸⁴ For cases using the term "probable" error or "probability" of error, see, *e.g.*, Unpub. Comp. Gen. B-150902, March 12, 1963; Unpub. Comp. Gen. B-149846, Oct. 30, 1962; Unpub. Comp. Gen. B-148079, July 12, 1962; Unpub. Comp. Gen. B-148481, April 3, 1962; 39 Comp. Gen. 36 (1959); 38 Comp. Gen. 517 (1959).

or likelihood⁸⁵ that the bid contained an error.⁸⁶ The use of words such as "possibility," "probability," or "likelihood" apparently has not been intended to establish any *standard* or *degree* of notice, and the writer knows of no case in which the use of such words has been discussed or compared. From an analytical standpoint, a contracting officer should be charged with constructive notice of error if, in view of the facts or circumstances, he should have known of the *possibility* of error in the bid. The word "probable" would suggest that the contracting officer had made some type of evaluation because "probable" means having more evidence for than against and is used as a synonym for "likely."⁸⁷ Since constructive notice is the legal substitute for actual notice, a comparison should be made with actual notice based upon allegation of error before award. It is clear that the mere allegation of error prior to award, without submission or evaluation of any evidence of the mistake, constitutes actual notice of error; therefore, the use of "probable" in connection with constructive notice seems inappropriate. In addition, the use of "possibility" is more consistent with the duty imposed by regulations.⁸⁸

B. *Circumstances Establishing Constructive Notice*

Discussion to this point has been limited to general rules and statements of legal principles involving the error detection duty of contracting officers. A statement of these general rules, however, does not answer the question of the contracting officer who asks: "what must I look for?" Nor does it answer the question that must be answered by the lawyer, the Comptroller General, or the courts; namely, did the contracting officer fulfill his obligation in a particular case? As in many areas of law, answers to such questions usually must be based upon an examination of cases in which the general rules

⁸⁵ For cases using this term, see Unpub. Comp. Gen. B-150105, Nov. 6, 1962; Unpub. Comp. Gen. B-149574, Aug. 24, 1962; Unpub. Comp. Gen. B-146314, Aug. 4, 1961; Unpub. Comp. Gen. B-143855, Sept. 15, 1960.

⁸⁶ The opinions sometimes equate constructive notice to factors or circumstances which raise a "suspicion of error" (Unpub. Comp. Gen. B-147368, Jan. 12, 1962; 37 Comp. Gen. 706 (1958)); or which are sufficient to have "indicated" the probability of error. Unpub. Comp. Gen. B-135594, April 3, 1958. Other decisions state the contracting officer should have had "ample reason to suspect" (Unpub. Comp. Gen. B-139897, June 26, 1959), or might have been "alerted" to (Unpub. Comp. Gen. B-147647, Dec. 27, 1961), or "aware of" (Unpub. Comp. Gen. B-149846, Oct. 30, 1962) the probability of error.

⁸⁷ See *Langford v. Pearson*, 334 S.W.2d 473, 476 (Tex. Civ. App. 1960) *error ref. n.r.e.*; *Indemnity Ins. Co. v. Carrell*, 318 S.W.2d 744, 748 (Tex. Civ. App. 1958) *error ref. n.r.e.*

⁸⁸ The regulations direct that a contracting officer shall obtain a verification of a bid in cases in which he "has reason to believe that a mistake *may* have been made." ASPR § 2-406.1; FPR § 1-2.406-1 (Emphasis added.) The word "possible," of course, is defined as that which may occur (neither probable nor impossible). See Webster, *New International Dictionary of The English Language* 1927 (2d ed. 1956). The Comptroller General has, in fact, equated this requirement of the regulations to notice of the *possibility* of error. Unpub. Comp. Gen. B-147113, Sept. 28, 1961.

have been applied to specific facts and circumstances. Therefore, this section will discuss specific factors and circumstances which, it has been held, should have alerted the contracting officer to the possibility of error in a bid.

In competitive procurements, the part of the bid or proposal prepared by the bidder generally is limited to *price* since the Government specifies what it wants, the quantity, the required delivery schedule, and the general provisions of the proposed contract. Consequently, nearly all factors or circumstances which may be a basis for constructive notice involve the *amount* of the bid.

1. *Errors Apparent on the Face of the Bid* There is probably only one category of cases in which it is clear that a contracting officer is charged with constructive notice of error; namely, if it is apparent from an examination of the bid itself that the bidder has made an error. The most obvious example of this situation is a discrepancy between the unit price and the total price; *i.e.*, the unit price multiplied by the total number of units to be delivered under the contract does not equal the total amount bid. This situation is so common, in fact, that a specific provision generally is included in the invitation for bids providing that if the bid contains a variance between the unit price and the extended price, the unit price will govern.⁸⁹ Such a provision does not, however, eliminate the contracting officer's error detection duty if such a variance does exist. The Comptroller General's position in this regard has been stated as follows:

Although the invitation does provide that in case of error in extension of price in the bid the unit price will govern, it is our opinion that such provision should only be applied, without requesting verification, where the correction results in a relatively minor change in the extended price or where the circumstances indicate that the unit price actually represents the intended price. . . .⁹⁰

⁸⁹ Paragraph 1(c) of the "Terms and Conditions of the Invitation for Bids" in both Standard Form 30, "INVITATION AND BID (Supply Contract)" (Oct. 1957 ed.), ASPR F-100.30, and Standard Form 33, "INVITATION, BID, AND AWARD (Supply Contract)" (Oct. 1957 ed.), ASPR F-100.33, provides: "Unit price for each unit bid on shall be shown and such price shall include packing unless otherwise specified. A total shall be entered in the Amount column of the Schedule for each item bid on. *In case of error in extension of price*, the unit price will govern." (Emphasis added.)

⁹⁰ 37 Comp. Gen. 829, 830 (1958). *Accord*, Unpub. Comp. Gen. B-147317, Dec. 6, 1961; Unpub. Comp. Gen. B-145505, June 21, 1961. The Comptroller General had stated previously, 36 Comp. Gen. 429, 431 (1956):

[I]t is well established that a bid cannot be considered as having been accepted in good faith if an error in the bid is so apparent that it must be presumed that the contracting officer knew of the mistake and sought to take advantage of it. That principle would be for application regardless of any statement made in the Government's invitation for bids or in its accompanying documents concerning possible errors such as discrepancies between unit prices and extended total amounts. . . .

Other examples of errors apparent on the face of the bid include obvious errors in placing a decimal point,⁹¹ obvious discount errors,⁹² a lower price f.o.b. destination than for f.o.b. origin,⁹³ and obvious errors in the designation of the unit.⁹⁴ All of these examples are specified in the regulation.⁹⁵

2. *Disparity in Bids* The factor or circumstance most frequently considered in questions of constructive notice is the inference, if any, that may be drawn from a comparison of the bids received. In other words, the difference between the amount of the low bid and the amount of the next low bid (and possibly all other bids) may be sufficiently large as to suggest the possibility of error in the low bid. It is the *comparison* of bids which is important here, although emphasis of this point has led to statements suggesting that a contracting officer cannot be charged with constructive notice if only one bid is received because there is no basis for comparison.⁹⁶ Similar reasoning has been used if only two bids are received: "[O]rdinarily no fair comparison with other bids can be made where only two widely variant bids are received, there being no more reason for considering the low bid too low than for considering that a mistake was made by the high bidder in quoting a price too high."⁹⁷ The quoted statement may be correct, but it is believed that the conclusion drawn from the statement—that the contracting officer should not be charged with constructive notice of error in such circumstances—is clearly erroneous. The statement itself implies that a variance between the amounts bid does suggest that *one* of the bids is in error; the lack of constructive notice is due to the fact that there are no

⁹¹ 17 Comp. Gen. 339 (1937); see also 17 Comp. Gen. 817 (1938).

⁹² 17 Comp. Gen. 493 (1937). The example of an obvious discount error given in the regulations is "1 per cent 10 days, 2 per cent 20 days, 5 per cent 30 days." ASPR § 2-406.2; FPR § 1-2.406-2.

⁹³ 16 Comp. Gen. 999 (1937); see also 17 Comp. Gen. 817 (1938).

⁹⁴ 17 Comp. Gen. 841 (1938).

⁹⁵ ASPR § 2-406.2; FPR § 1-2.406-2.

⁹⁶ See, e.g., Unpub. Comp. Gen. B-146413, Aug. 1, 1961; 26 Comp. Gen. 415 (1946). In fairness, such statements are usually qualified by the word "ordinarily." These statements, even as qualified, may be misleading inasmuch as there are many situations in which a contracting officer may be on constructive notice of error even though only one bid is received. For example, relief was granted in one case in which only one bid was received which was on the basis of f.o.b. *destination*. It was held that the contracting officer should have suspected error in view of the fact the contractor had, for the past three years, consistently bid f.o.b. *origin* at the same unit prices it intended to offer in the bid. Unpub. Comp. Gen. B-149138, June 29, 1962. Similarly, a contracting officer was charged with constructive notice since only one bid was received but the amount of such bid was only 76% of the Government's estimate of the cost of procuring the equipment. Unpub. Comp. Gen. B-148325, March 23, 1962.

⁹⁷ 20 Comp. Gen. 286, 288 (1940). *Accord*, Unpub. Comp. Gen. B-150593, Jan. 28, 1963; Unpub. Comp. Gen. B-143216, Aug. 18, 1960; Unpub. Comp. Gen. B-143310, July 15, 1960.

other bids to indicate *which* bid is in error. This reasoning overlooks the fact that the contracting officer's error detection duty relates only to the *low* bidder and that the high bidder will not be adversely affected if its bid is erroneous.⁹⁸ In short, if the variance does in fact suggest that one of the bids is in error, the contracting officer certainly should be charged with notice of the *possibility* of error in the low bid.⁹⁹ Can the contracting officer *in good faith* accept the low bid without verification on the basis that there is a fifty per cent chance the bid is correct? It has never been questioned, of course, that a contracting officer may be charged with constructive notice of error in the low bid, even if only two bids are received, if other factors are present.¹⁰⁰

It is difficult to generalize with respect to the significance to be drawn from a comparison of bids. For example, the "range" of all bids may be as important as the difference between the low bid and the next low bid. The fact that all bids except the low bid were in a narrow range has been noted specifically as significant in finding the contracting officer was on constructive notice of error.¹⁰¹ The contrary implication could arise if the amount of the difference between the low bid and the next low bid is no greater than the differences between the other bids received; *i.e.*, if there is a wide range in the prices received.¹⁰² In one case concluding that the contracting officer was on constructive notice of error, the Comptroller General noted that the difference between the amounts of the low and the next low bid was significantly more than the *average* difference be-

⁹⁸ This statement would not apply, of course, to cases involving the disposal of government property (*i.e.*, sales cases) in which the duty is to the *high* bidder, and in such cases it is the low bidder who would not be adversely affected.

⁹⁹ See note 88 *supra* and accompanying text. The Comptroller General has, in fact, so held. In Unpub. Comp. Gen. B-147090, Dec. 21, 1961, it was stated that the disparity between the low bid and "the other bid received" indicated "a certainty that a gross error had been made." In Unpub. Comp. Gen. B-144172, Oct. 17, 1960, it was held that the disparity between the amount bid by the contractor *for an item not awarded to the contractor* and the amount bid for such item in the only other bid received was constructive notice of error.

¹⁰⁰ Unpub. Comp. Gen. B-149846, Oct. 30, 1962 (variance between low bid and government estimate); Unpub. Comp. Gen. B-143942, Sept. 20, 1960 (other bidder was brand-name manufacturer); Unpub. Comp. Gen. B-143436, July 22, 1960 (shipping weights stated in low bid indicated erroneous interpretation of specifications).

¹⁰¹ In one case, the Comptroller General noted that the low bid of \$1,024.15 was more than \$358 lower than the next low bid, while "the three other bids received were closely in range there being a difference of only \$57 between them." Unpub. Comp. Gen. B-147647, Dec. 27, 1961.

¹⁰² See Unpub. Comp. Gen. B-146314, Aug. 4, 1961; Unpub. Comp. Gen. B-138804, March 13, 1959.

tween any two of the other sixteen bids.¹⁰³ In view of the wide range in prices customarily received in cases involving the sale of government salvage or surplus property, a disparity in bids normally would not have the same significance as would a like difference in prices quoted on new equipment or supplies to be furnished to the Government.¹⁰⁴ The reason for such conclusion is that prices offered to the Government for its surplus property are based more or less upon the use to which the property is to be put by the particular bidder or upon the risk of resale which the bidder might wish to take.¹⁰⁵ There certainly is no reason, however, why a disparity in the amounts of the bids received should not place the contracting officer on constructive notice of error if, under the particular circumstances, a reasonable person would have suspected the possibility of error.

The cases do not permit any generalization with respect to the amount of disparity that will be sufficient to give the contracting officer constructive notice of the possibility of error in the low bid. For example, it has been held that the contracting officer was on constructive notice of error although the second low bid exceeded the low bid by less than eight per cent;¹⁰⁶ on the other hand, relief has been denied even though the disparity was over forty per cent.¹⁰⁷ In some cases, relief has been granted when the low bid and the next low bid *both* were out of line with the other bids received.¹⁰⁸ Many factors properly could be considered in determining the amount of disparity which should alert the contracting officer to the possibility of error in a particular procurement. The nature of the item (specially manufactured or "off the shelf" with known market prices), the condition of the economy and even of the particular industry, the experience of the bidders generally, and the customary degree of competition among suppliers of the item all

¹⁰³ Unpub. Comp. Gen. B-148481, April 3, 1962. In another case, a contractor suggested that the contracting officer should have been on constructive notice of error since the *average price* of all bids was higher than his bid. The logic in the Comptroller General's reply is difficult to criticize: "Any time a low bid is excluded and an average is computed from a group of bids, all of which are higher, the average of the higher bids must, of necessity, be higher than the low bid." Unpub. Comp. Gen. B-148412, May 9, 1962 (relief granted on reconsideration in opinion dated Aug. 13, 1962). The average of all bids other than the low bid may be significant if the disparity between the low bid and such average is sufficiently great. See *C.N. Monroe Mfg. Co. v. United States*, 143 F. Supp. 449 (E.D. Mich. 1956); Unpub. Comp. Gen. B-90669, Nov. 23, 1949.

¹⁰⁴ Unpub. Comp. Gen. B-148642, April 25, 1962; Unpub. Comp. Gen. B-144230, Oct. 26, 1960; Unpub. Comp. Gen. B-144229, Oct. 19, 1960; 28 Comp. Gen. 261 (1948).

¹⁰⁵ *United States v. Sabin Metal Corp.*, 151 F. Supp. 683, 689 (S.D.N.Y. 1957); Unpub. Comp. Gen. B-148642, April 25, 1962.

¹⁰⁶ Unpub. Comp. Gen. B-148412, Aug. 13, 1962.

¹⁰⁷ 17 Comp. Gen. 373 (1937).

¹⁰⁸ *C.N. Monroe Mfg. Co. v. United States*, 143 F. Supp. 449 (E.D. Mich. 1956); Unpub. Comp. Gen. B-144300, Nov. 4, 1960.

might be considered in such a determination. Finally, the difference between the low and the next low bid may not, by itself, be sufficient for constructive notice, but such difference coupled with one or more of the other factors discussed hereafter may very well be sufficient.

3. *Government Estimate* It is customary in competitive procurements for the Government to prepare, for its own use, an estimate of the probable cost of the supplies or services. One purpose of this "government estimate" is to assist the contracting officer in determining whether the prices in the bids submitted are reasonable.¹⁰⁹ The government estimate also is an important factor in the error detection duty of the contracting officer; it frequently has been cited as the determinative factor in finding that the contracting officer should have known of the possibility of error in cases in which only two bids were received in response to the invitation.¹¹⁰ The element of notice, of course, involves the disparity between the amount of the low bid and the amount of the government estimate. This disparity alone may be sufficient to charge the contracting officer with constructive notice;¹¹¹ it often is combined with other factors for such purpose.¹¹² A disparity between the amount of the low bid and the government estimate may not be significant if the amounts of several other bids also are below the government estimate.¹¹³ In a recent case, the Court of Claims held that the contracting officer was not on constructive notice of error in the low bid, even though the amount in the next low bid for one item was almost two and one-half times the amount for such item in the low bid, because the difference between the amount in the low bid and the government estimate for such item was not significant.¹¹⁴

¹⁰⁹ See note 28 *supra* and accompanying text.

¹¹⁰ See, e.g., Unpub. Comp. Gen. B-149846, Oct. 30, 1962; Unpub. Comp. Gen. B-146124, Sept. 1, 1961; Unpub. Comp. Gen. B-144018, Sept. 29, 1960.

¹¹¹ Unpub. Comp. Gen. B-148325, March 23, 1962. In this case only one bid was received; therefore, this was the only factor available.

¹¹² Unpub. Comp. Gen. B-151663, July 17, 1963 (additional factor was disparity in bids); Unpub. Comp. Gen. B-137690, Nov. 20, 1958 (additional factor was difference in amount of bid and amounts of prior procurements); see also cases cited in note 110 *supra*.

¹¹³ Unpub. Comp. Gen. B-150073, Nov. 13, 1962. *But see* Unpub. Comp. Gen. B-148120, Feb. 27, 1962, in which relief was granted based upon the contracting officer's statement that he should be charged with constructive notice of mistake because of his failure to give "full weight" to the government estimate since the second low bid was also "considerably less" than the government estimate.

¹¹⁴ *Allied Contractors, Inc. v. United States*, ___ Ct. Cl. ___, 310 F.2d 945 (1962). There were several alternative justifications for the court's conclusion. It would seem that a reasonable person would suspect the possibility of error in both the low bid and the government estimate in a situation in which they were "in line" with each other but were considerably lower than the other bids. Logically, the situation is the same as if the low bid and the next low bid are both out of line with the other bids. See note 108 *supra* and accompanying text.

The discussion of the government estimate in *Frazier-Davis Constr. Co. v. United States*¹¹⁵ is misleading. In that case, the amount of the low bid was considerably below the amount of the government estimate. The low bidder was awarded the contract and later sued the Government alleging that certain material facts had been withheld by the Government which resulted in the plaintiff making a gross error in its bid. One of the "material facts" was the amount of government estimate. The court said, however, that the Government was under no obligation to disclose the amount of the government estimate to bidders and that to do so would tend to destroy competition.¹¹⁶ The court undoubtedly was correct insofar as its statement relates to disclosure of the amount of the government estimate before the bids are opened. But it is believed that its conclusion is erroneous, and the reasons therefor inapplicable, with regard to disclosure of the amount of the government estimate after the bids are opened.¹¹⁷ The court did not discuss whether or not the contracting officer should have suspected the possibility of error in view of the disparity between the low bid and the amount of the government estimate.

The importance of the government estimate is illustrated by the cases holding that, in effect, a contracting officer may be charged with constructive notice of error in the low bid because of an *erroneous* government estimate. Relief in these cases has been authorized in situations in which it was concluded that the contracting officer would have obtained a verification of the low bid *if* the government estimate had been correct or even more accurate.¹¹⁸ The result of these cases is difficult to reconcile with the "fault" concept of relief for mistakes; *i.e.*, the issue of good faith on the part of the contracting officer. Some cases of this type might be better explained on a theory of mutual mistake in that both the bidder and the Government were mistaken as to the scope or amount of the effort required.¹¹⁹

¹¹⁵ 100 Ct. Cl. 120 (1943).

¹¹⁶ *Id.* at 162-63.

¹¹⁷ The competitive bidding system would not be prejudiced by such disclosure after bids are opened since the bids can neither be modified nor withdrawn after such time. The duty to disclose information to bidders after bids are open is discussed in section IV of this Article *infra* entitled "Verification."

¹¹⁸ Unpub. Comp. Gen. B-149283, Dec. 26, 1962; Unpub. Comp. Gen. B-147702, March 13, 1962; Unpub. Comp. Gen. B-147580, Nov. 21, 1961. Relief was denied in one case involving such a situation, but the case is distinguishable by the Comptroller General's statement that there was no clear and convincing evidence of error. Unpub. Comp. Gen. B-146253, July 14, 1961.

¹¹⁹ See Unpub. Comp. Gen. B-143861, Sept. 16, 1960. In this case, both the contractor's bid and the Government's estimate for reglazing windows were computed on the basis of the building containing 1,350 windows. After award it was discovered the building had 6,750 windows, and the government estimate was increased from \$5,464 to \$24,384. The

4. *Prior Procurements* Another factor which may be sufficient to alert the contracting officer to the possibility of error in the low bid is a comparison of the bid with the prices paid in the past for the same or similar items. As stated by J. E. Welch, now Deputy General Counsel, GAO:

Another criterion which has been considered and used by the GAO in determining whether the contracting officer should have suspected the probability of error in a bid is whether he had estimated a substantially different price for the procurement or *had knowledge of a prior record of purchases for the same or similar items at substantially different prices.* . . .¹²⁰ (Emphasis added.)

The comparison of the bid with the prior procurements may be sufficient, without more, to charge the contracting officer with constructive notice of error;¹²¹ more frequently, such a comparison is in addition to other factors.¹²² A comparison of the low bid with prior procurements may be the determining factor if the disparity in bids alone would be insufficient for constructive notice.¹²³ Similarly, in one case a contracting officer was not charged with constructive notice even though there was a significant disparity in the amounts of the low bid and the other bids received because the low bid was in line with previous procurements.¹²⁴

One decision of the Comptroller General in 1959 cast considerable doubt upon the relationship of prior procurements to constructive notice by suggesting that differences between a low bid and the

Comptroller General authorized relief since "the contract transaction was entered into with the erroneous understanding on the part of both the contractor and the Government that there were no more than 1,350 windows to reglaze."

¹²⁰ Welch, *Mistakes in Bids*, *supra* note 10, at 83.

¹²¹ In Unpub. Comp. Gen. B-150902, March 12, 1963, the contractor's price was \$21.00 per unit for blood. The contractor alleged error in that it did not notice that, because of a change in the specifications from prior procurements, it was obligated to furnish the containers for each unit of blood. It was held that the contracting officer was on constructive notice of error in view of three prior procurements under which the contractor had bid the same price although the Government furnished the containers. In Unpub. Comp. Gen. B-149138, June 29, 1962, the only bid received was submitted by the sole supplier of the item. After award, the contractor alleged it had not intended to bid on f.o.b. destination basis. The Comptroller General first noted that the contractor, in the past three years, had "consistently bid f.o.b. origin at the same unit prices it says it intended to offer on this contract" and thereafter concluded that the contracting officer should have entertained sufficient doubt as to warrant an inquiry.

¹²² Unpub. Comp. Gen. B-143144, July 5, 1960 (disparity in bids); Unpub. Comp. Gen. B-138272, Jan. 19, 1959 (disparity in bids and value of item); Unpub. Comp. Gen. B-137690, Nov. 20, 1958 (bid also out of line with government estimate); Unpub. Comp. Gen. B-137221, Sept. 8, 1958 (should have known bidder's item did not meet specifications); Unpub. Comp. Gen. B-129514, Nov. 29, 1956 (bid out of proportion to value of equipment).

¹²³ Unpub. Comp. Gen. B-137139, Sept. 9, 1958.

¹²⁴ Unpub. Comp. Gen. B-146264, Aug. 18, 1961. Compare note 114 *supra* and accompanying text.

prices paid under prior procurements would not be sufficient to put a contracting officer on notice of error.¹²⁵ On reconsideration, however, this view was modified considerably by the statement that contracting officers are not required to "give great weight to the details of bids received four years previously for the same item but for different quantities to ascertain the reasonableness of the prices quoted. . . ."¹²⁶ Even this statement is misleading in view of the cases holding that the amounts paid under prior procurements may be an important or even determining factor in constructive notice.

A comparison of current prices with the prices paid under prior procurements is particularly significant in evaluating proposals under *negotiated* procurements. The regulations state that some form of price analysis should be made in connection with every procurement action in order to determine the reasonableness of the prices quoted. Moreover, a comparison of prior quotations or contract prices with current quotations for the same or similar items is one form of analysis specifically suggested.¹²⁷ Since the very purpose of price analysis is to determine the reasonableness of proposals, a significant disparity between the amount of the current quotation and the prior contract prices undoubtedly should, in the absence of unusual circumstances, constitute constructive notice to the contracting officer of the possibility of error. One other point should be mentioned in connection with evaluation of proposals in negotiated procurements. Contractors submitting proposals frequently are required to submit a government form entitled "Cost and Price Analysis,"¹²⁸ which is a detailed breakdown of the cost elements of the proposal. In addition, the form requires an identical breakdown of the *actual* unit cost under the contractor's previous contract. With such detailed information available, it is doubtful that a person submitting a proposal could make any significant error without placing the contracting officer on constructive notice of such possibility. In addition, the specific elements of the actual unit cost of the prior contractor may alert the contracting officer to the possibility of error in the amount proposed by a different contractor for such item.

5. *Value or Market Price* If the item to be furnished to the Govern-

¹²⁵ 39 Comp. Gen. 36, 38 (1959). The decision stated: "[W]e do not believe that knowledge of price differences as may have existed with respect to prior procurements should be imputed to a contracting officer in evaluating bids in a situation such as here involved where the spread of bid prices would not have put him on notice of probability of error. . . ."

¹²⁶ 39 Comp. Gen. 405, 407 (1959).

¹²⁷ ASPR § 3-807.2(b)(1)(ii); FPR § 1-3.808-2(b).

¹²⁸ Department of Defense Form 633, "COST AND PRICE ANALYSIS" (1 April 1959 ed.), ASPR § F-200.663.

ment has a market price or reasonable value that the contracting officer knows or should know and if there is a significant difference between the amount of the low bid and such market price or value, the contracting officer certainly should be alerted to the possibility of error in the bid. It may be extremely difficult to prove that the item did have a market price or value of which the contracting officer knew or should have known. However, upon such proof, the logical conclusion must be that the contracting officer was on constructive notice of the possibility of error. The Comptroller General has observed in several decisions, as an additional reason for concluding the contracting officer was on constructive notice, that the amount of the bid was disproportionate with the value of the item.¹²⁹

Two cases warrant limited discussion on this point. In the first,¹³⁰ the low bid (thirty-five dollars each for flood lights) was "out of line" with other bids and past procurements of the item. The bidder verified the price and also that its unit met specifications. After award, however, the bidder alleged error in that it mistakenly believed most parts could be manufactured, whereas they had to be purchased in the open market. The Comptroller General granted relief on the basis that the contracting officer was on constructive notice of error at the time of award because the bidder's price was "out of proportion to the value of the equipment" and because the contracting officer "should have realized that a bidder intentionally would not offer to furnish the flood light covered by the invitation for \$35 per unit. . . ." The second case¹³¹ involved a procurement of a certain number of pieces of steel conduit (two and one-half inches in diameter and approximately ten feet in length). A purchase order was issued on the basis of an alleged quotation of one dollar and fifteen cents for each piece. The contractor delivered and billed at a rate of one dollar and fifteen cents *per foot*. In granting relief, the Comptroller General said: "[T]he Government's purchasing agent should have realized that a steel conduit, 2½" thick, 10' long, with coupling attached, could not be profitably furnished at \$1.15 each, notwithstanding the existence of the Government's estimate of \$0.50 each. . . ." The reasoning of these cases should also apply if the contracting officer should have known of a market price for the item.

¹²⁹ See Unpub. Comp. Gen. B-147317, Dec. 6, 1961; Unpub. Comp. Gen. B-144018, Sept. 29, 1960; Unpub. Comp. Gen. B-137690, Nov. 20, 1958; Unpub. Comp. Gen. B-90669, Nov. 23, 1949; see also Unpub. Comp. Gen. B-138272, Jan. 19, 1959, in which the purchasing agent reported that he *knew* that the item could only be purchased for approximately four times the amount of the low bid.

¹³⁰ Unpub. Comp. Gen. B-129514, Nov. 29, 1956.

¹³¹ Unpub. Comp. Gen. B-144834, Feb. 2, 1961.

6. *Miscellaneous* The cases that do not fit into any specific category provide the best insight with regard to the circumstances under which a contracting officer may be charged with constructive notice of error. Furthermore, these cases illustrate that the error detection duty of a contracting officer involves more than a cursory examination of the bids and is, in fact, a challenging responsibility.

One situation which now seems firmly established as constituting constructive notice of error is that in which the bid of a non-manufacturer is lower than a bid from a manufacturer of the item.¹³² Although this circumstance probably occurs infrequently, it is difficult to imagine a situation more suggestive of error. The Comptroller General also has suggested in at least two cases that the contracting officer should have known from experience that only one manufacturer (who was not the bidder) could furnish an item meeting the specifications.¹³³

In a recent case, the Comptroller General stated that the disparity in bids alone was insufficient to constitute constructive notice of error; however, another bidder wrote to the contracting officer before award suggesting that the low bidder must have interpreted the specifications differently in view of the low price. The Comptroller General held that this warning, together with the disparity in bids, was constructive notice of the possibility of error.¹³⁴

If the low bid is "out of line with itself," another interesting circumstance of constructive notice is present. For example, in one case the amount bid for one size box was more than the amount bid by the same bidder for a larger and stronger box;¹³⁵ in another case the identical unit price was bid for two items of paint, one of which was more expensive than the other.¹³⁶ Similarly, the amount bid for certain items may be "out of line" with the amount submitted for other items by the same bidder because of quantity or size.¹³⁷ Another bid was sufficiently "out of line with itself" to place the contracting officer on notice of the possibility of mistake in the bid because of

¹³² Unpub. Comp. Gen. B-150707, April 15, 1963 (bid of nonmanufacturer f.o.b. destination was same amount as manufacturer's bid f.o.b. origin); Unpub. Comp. Gen. B-149228, Aug. 1, 1962; Unpub. Comp. Gen. B-145192, March 16, 1961; Unpub. Comp. Gen. B-143942, Sept. 20, 1960. In an earlier decision, the Comptroller General indicated that this fact might not "in and of itself" be sufficient to place the contracting officer on notice of a possible mistake in bid. Unpub. Comp. Gen. B-137139, Sept. 9, 1958. See also Unpub. Comp. Gen. B-145369, April 11, 1961, in which the contracting officer fulfilled his duty by pointing out to the low bidder that its bid was lower than prices quoted by manufacturers.

¹³³ 38 Comp. Gen. 517, 521 (1959); Unpub. Comp. Gen. B-137221, Sept. 8, 1958.

¹³⁴ Unpub. Comp. Gen. B-151963, Aug. 16, 1963.

¹³⁵ Unpub. Comp. Gen. B-147656, Dec. 12, 1961; 37 Comp. Gen. 654 (1958).

¹³⁶ 37 Comp. Gen. 398 (1957).

¹³⁷ Unpub. Comp. Gen. B-128819, Sept. 10, 1956.

contradictory information in sales literature submitted with the bid.¹³⁸ In another case, it might be said that the low bid was "out of line" with a *previous bid* of the same bidder inasmuch as the contracting officer was charged with constructive notice of error because the low bidder had bid the identical amount a short time previously under less costly specifications, whereas the only other bidder increased its price significantly over the prior bid.¹³⁹ A disparity between the shipping weights used by two bidders was cited in one case as a factor of constructive notice.¹⁴⁰ One final case contains interesting implications. The contractor alleging mistake was a small business concern and the Comptroller General made the following statement concerning constructive notice:

[T]he contractor's prices for the items delivered from the east coast to the west coast are lower than the prices bid by the big business suppliers on the west coast. Therefore, the contracting officer should have suspected an error and verified the prices prior to making an award.¹⁴¹

The geographical location and size of the bidder together were noted as an additional basis for constructive notice. Would these two be sufficient for constructive notice without other factors? Could either item *alone* ever constitute constructive notice?

C. Effect of Constructive Notice

The legal effect of constructive notice occurs only at or after award of the contract. By definition, constructive notice exists if the contracting officer *should have* known of the possibility of error. If the contracting officer has accepted a bid even though he should have known of the possibility of error, it is presumed that he acted in bad faith and sought to take advantage of the bidder. From a practical standpoint, however, it is the prospective application of the principles contained in the cases involving constructive notice that is beneficial. Stated differently, the cases suggest circumstances to the contracting officer in which he *should* suspect the possibility of error. When such circumstances exist, the error detection duty of the contracting officer continues and he must

¹³⁸ Unpub. Comp. Gen. B-146649, Oct. 31, 1961. The bid enclosed a "schedule of discounts" which stated a commercial list price higher than the amount in the bid.

¹³⁹ Unpub. Comp. Gen. B-147368, Jan. 12, 1962. In a similar case, the contracting officer was charged with constructive notice because, in addition to a disparity in bids, the low bidder had submitted two previous quotations at nearly the same price for furnishing two items less than required by the subsequent quotation. Unpub. Comp. Gen. B-149429, Aug. 2, 1962.

¹⁴⁰ Unpub. Comp. Gen. B-143436, July 22, 1960.

¹⁴¹ 37 Comp. Gen. 654, 655 (1958).

attempt to obtain a verification of the bid from the bidder. This duty arises from two sources: first, such action is specifically required by regulation;¹⁴³ second, it arises by implication from the principle that acceptance of a bid without such action is presumed to be in bad faith; that is, the opportunity to recheck the bid given to the bidder by the request for verification rebuts the presumption of bad faith.

Any such simple statement of the contracting officer's duty is misleading. The contracting officer's request for verification must be adequate or sufficient under criteria established in the cases. The legal effect of a contracting officer's acceptance of a bid after an inadequate or insufficient verification is the same as if no request for verification had been made; namely, it is presumed that such acceptance was in bad faith. There has been little written concerning the contracting officer's responsibility in requesting verification; unfortunately, many honest and conscientious contracting officers simply do not appreciate the existence of any such responsibility, much less its extent.

IV. VERIFICATION

A. General Requirement

The federal common law relating to mistakes in contracts originated, for practical purposes, with the case of *Kemp v. United States*.¹⁴³ In the *Kemp* decision, the court granted relief on the basis that the Government knew or should have known of an error in the bid at the time of its acceptance. An important qualification to the *Kemp* doctrine later was expressed by the Court of Claims; namely, the contracting officer cannot be charged with having acted in bad faith if the bidder was given an opportunity to recheck and confirm the bid.¹⁴⁴ This qualification was the contracting officer's panacea and led to the common practice, which still exists in many procurement offices, of automatically requesting the low bidder in every procurement to verify its price. This request for verification normally was made by telephone and was considered as merely another procedural step in the award of a contract. The low bidder usually was requested to confirm the

¹⁴³ ASPR § 2-406.1; FPR § 1-2.406-1. This requirement of the regulation was noted in a recent decision of the Comptroller General. Unpub. Comp. Gen. B-151735, Sept. 11, 1963.

¹⁴³ 38 F. Supp. 568 (D.C. Md. 1941).

¹⁴⁴ *Alabama Shirt & Trousers Co. v. United States*, 121 Ct. Cl. 313 (1952). See note 51 *supra*.

telephonic verification by wire or letter. This action, often prompted by no more than an item on a clerk's check list, generally was considered to preclude any possibility of relief to the contractor inasmuch as such action rebutted any presumption that the acceptance was in bad faith.

This "good faith by check list" ended, however, with the leading case of *United States v. Metro Novelty Mfg. Co.*¹⁴⁵ This decision is the basis of the requirement that the request for verification must be adequate or sufficient, and it also established the initial test in this regard. The importance of the opinion in this case is belied by its length, which is two short paragraphs. The facts of the case, although not recited in detail in the opinion, are available from two sources—a prior unpublished decision of the Comptroller General¹⁴⁶ and the official records of the court.¹⁴⁷ The significance of this decision and the fact that the sources mentioned are not readily accessible necessitates that the facts be set forth in detail.

B. *The Metro Case*

The United States Marine Corps invited bids—to be opened December 3, 1947—for furnishing a quantity of gilt cap ornaments (Item 5) and a quantity of gilt collar ornaments (Item 6) for delivery to Philadelphia and San Francisco. The following bids were received in response to the invitation:¹⁴⁸

<i>Bidder</i>	<i>Unit Price Per Item</i>			
	5 (a)	5 (b)	6 (a)	6 (b)
Metro	\$.060	\$.060	\$.108 (pair)	\$.108 (pair)
No. 2	.140	.142	.230 (pair)	.240 (pair)
No. 3	.151	.152	.288 (pair)	.290 (pair)
No. 4	.440	.440	.360	.360

The contracting officer called the president of Metro and asked: (a) what equipment the firm had; (b) what experience the firm had

¹⁴⁵ 125 F. Supp. 713 (S.D.N.Y. 1954).

¹⁴⁶ Unpub. Comp. Gen. B-75179, June 4, 1948.

¹⁴⁷ *United States v. Metro Novelty Mfg. Co.*, Civil Action No. 87-153, United States District Court for the Southern District of New York. There was no dispute over any of the facts involved; the case was, in fact, decided on cross motions for summary judgment.

¹⁴⁸ Abstract of Proposals [sic], Exhibit "J" to Affidavit of Robert W. Sweet filed with Notice of Motion for Summary Judgment, *United States v. Metro Novelty Mfg. Co.*, *supra* note 147.

in producing the item; and (c) that the bid be verified.¹⁴⁹ The president of the bidder verified the bid by letter providing as follows:

This is to confirm our telephone conversation of this date regarding our bid on requisition No. 1823 for collar ornaments in which we quoted the price of \$.054 each. The price per set of one left and one right is \$.108. Again we wish to assure that we are equipped and experienced in manufacturing this type of item and are certain that we can supply you with an excellent product and meet delivery dates.¹⁵⁰

The bid of Metro was accepted on all items, and the company acknowledged receipt of the contract on December 29, 1947.

By letter dated March 24, 1948, Metro wrote to the General Accounting Office, alleged that a mistake had been made in its bid, and requested an increase in the contract price. The company alleged that, in preparing its bid, all costs of die work, tool work, overhead, and profit were omitted, and a miscalculation had been made with reference to the weight of the metal involved.¹⁵¹ The Comptroller General denied relief stating: "The fact that the acceptance of the bid was not made until after the company had been afforded an opportunity to verify its bid, precludes any assumption that the contracting officer exercised bad faith or attempted to take advantage of the bidder. . . ."¹⁵²

The Contractor thereafter failed to perform, and the contract was terminated for default. The Government reprocured the uniform ornaments and sued Metro for the excess cost. The court granted Metro's motion for summary judgment saying:

Cross motions are presented for summary judgment. Plaintiff seeks to recover \$12,000 damages from defendant for its failure to carry out a \$6,000 bid for uniform ornaments. Defendant claims a mistake in the computation of the bid. Plaintiff admits that the error was so gross that it was placed on notice. It further admits that the only consequence of defendant's failure to perform was the acceptance of the second lowest bid and that there was no damage to the government from the delay in execution which resulted from defendant's participation in the bidding.

¹⁴⁹ Affidavit of Joseph Millman, *United States v. Metro Novelty Mfg. Co.*, *supra* note 147. The opinion of the Comptroller General, see note 146 *supra*, states that the request for verification related *only* to items 6(a) and (b) (collar ornaments). This fact is supported by the actual verification received from the bidder. See note 150 *infra* and accompanying text.

¹⁵⁰ Unpub. Comp. Gen. B-75179, June 4, 1948.

¹⁵¹ *Ibid.* The reason for the mistake is explained in paragraph "NINTH" of Defendant's Answer in the *Metro* case, *supra* note 147. It was alleged that the company's employee "customarily entrusted with figuring prices" was mentally and physically unable to perform his job because (unknown to the company) he was suffering from a serious stomach ailment and was under medical care and sedation.

¹⁵² Unpub. Comp. Gen. B-75179, June 4, 1948.

Plaintiff's purchasing agent sought to avoid the force of *Kemp v. United States*, D.C. Md. 1941, 38 F. Supp. 568, by telephoning the defendant and asking for a 'verification' of the bid and by having it 'confirmed' by telephone and letter from defendant's president. *Plaintiff, however, did not put defendant on notice of the mistake which it surmised*. Reaffirmation of the bid under these circumstances does not bar the defense of rescission.¹⁵³ (Emphasis added.)

Thus, the first test or standard for the adequacy or sufficiency of a verification was established—did the request for verification put the bidder on notice of the mistake which the contracting officer surmised?¹⁵⁴ Consequently, we now have a "qualitative test" to apply to the action of the contracting officer in requesting verification.

C. Application Of Metro Principle

The language of the court in the *Metro* decision assumes, it is believed, an essential element of a request for verification. The decision expressly requires that the bidder be placed on notice of the mistake which the contracting officer surmised; this, however, impliedly requires that the bidder be placed on notice that the contracting officer surmises a mistake. In other words, the contracting officer at the very minimum should specifically advise the bidder of the *purpose* of the request for verification; namely, that he suspects the possibility of a mistake in the bid. This requirement has now been recognized

¹⁵³ *United States v. Metro Novelty Mfg. Co.*, 125 F. Supp. 713, 714 (S.D.N.Y. 1954).

¹⁵⁴ The court undoubtedly meant that the contracting officer failed to notify the bidder that a mistake was suspected in view of the disparity between the amounts of the low bid and the other bids received. This conclusion is supported by the pleadings (paragraph "TENTH", Defendant's Answer) in which Metro took the position that the contracting officer had notice of the error because of the "great disparity" between its bid and the other bids received. It is also supported by the court's statement that Plaintiff admitted the error was so gross that it was placed on notice. There is an ironic possibility, however, that (in this of all cases) the contracting officer *did* in fact advise the bidder of the mistake he surmised. This is merely conjecture of the writer, but the circumstantial evidence is fairly strong. First, the amount of Metro's bid on items 6(a) and (b) was (notwithstanding the contrary statement of the Comptroller General) \$.108 per pair and not \$.054 per unit (this is supported by paragraph 3 of the Plaintiff's Amended Complaint and by the Abstract of Bids, see note 148 *supra*). The contracting officer, looking at the abstract of bids, probably surmised that Metro's bid of \$.108 per pair was in error and should have been \$.108 each (or \$.216 per pair, which would not have been grossly out of line with the other bids). If so, it is natural to assume that the contracting officer called the bidder and asked if its bid on items 6(a) and (b) was per unit or per pair, *which was exactly the error the contracting officer surmised*. This would explain why, as stated by the Comptroller General, the request for verification related only to items 6(a) and (b). Such an assumption is supported strongly by the wording of Metro's letter of verification (see note 150 *supra* and accompanying text). If the writer's guess is accurate, the contracting officer did put Metro on notice of the error he actually surmised. This suggests an interesting question: If a contracting officer puts the bidder on notice of the mistake which he *actually* surmises, is the verification insufficient if the contracting officer fails to advise the bidder of circumstances from which the possibility of error *should have been* suspected?

by the Comptroller General.¹⁵⁵ It has been concluded, and properly so, that the failure to point out why the request for verification is made actually misleads the bidder into believing that his bid is "in line" with the others.¹⁵⁶

After the purpose of the request is explained to the bidder, the contracting officer must, as stated in the *Metro* case, put the bidder on notice of *the mistake* which he surmises. The specific language used by the court in the *Metro* case is unfortunate inasmuch as a contracting officer seldom suspects a specific mistake. Occasionally, the nature of a specific mistake is suspected; for example, in one case a bidder bid the same unit price for three-inch tape as it did for two-inch tape, but this fact was not specifically called to the bidder's attention in the request for verification. It was held that the request should have asked the bidder to verify that he intended to bid an identical price for both sizes of tape.¹⁵⁷ In another case, the request for proposal for a computer also required thirty items of spare parts. In reviewing the low proposal, technical experts advised the contracting officer that the amount in the proposal for spare parts was low as compared with the government estimate and that the difference probably reflected the omission of the "main logic board." The company verified by telephone and wire that its price for spare parts covered all thirty items. It was held that the request for verification was insufficient since the bidder was not specifically advised of the

¹⁵⁵ In Unpub. Comp. Gen. B-144252, Oct. 20, 1960, the contracting officer had telephoned the low bidder and requested confirmation of price and delivery schedule and inquired if the bidder was a small business and contemplated using government-owned equipment. The decision stated:

The purpose of requiring price confirmation and other information was not explained to [the bidder]. In view of all the information that was being required, the bidder could have easily construed the request merely as an attempt to perfect the understanding between the parties instead of as notice of possible error. In these circumstances, we conclude that the telephone request for verification was not adequate to put the bidder on notice that an error was suspected and to afford it a sufficient opportunity to check its quotation. Therefore, we are of the opinion that the purported acceptance of the bid did not result in a valid, binding contract. . . . (Emphasis added.)

Similarly, in Unpub. Comp. Gen. B-142810, July 20, 1960, the buyer called the bidder on another matter and suggested he recheck his figures. The Comptroller General said:

No indication was given [the bidder] that there was doubt as to the correctness of his bid. [The bidder] explains that from prior dealings he understood the suggestion to recheck his figures as a request as to whether or not he could lower his bid and that he did not re-figure the bid since he felt that the bid which had been submitted was at a minimum. In these circumstances, it is not believed that such request can properly be considered as a request for verification of the bid. . . . (Emphasis added.)

¹⁵⁶ Unpub. Comp. Gen. B-134428, Jan. 16, 1958. *Accord*, Unpub. Comp. Gen. B-137288, Oct. 31, 1958. Note also how the bidders misunderstood the purpose of the request for verification in the quotations in note 155 *supra*. One reason for this, it is believed, is the common practice of a pro forma request for verification.

¹⁵⁷ Unpub. Comp. Gen. B-136024, May 15, 1958.

probability that the price of the main logic board had been omitted.¹⁵⁸ The Comptroller General also held a request for verification insufficient because the contracting officer failed to advise the bidder that he surmised that the bid was based on material meeting only one of the two applicable specifications.¹⁵⁹

In the majority of cases, however, the contracting officer merely notices some circumstance, such as a disparity in bids, from which he suspects that the low bidder possibly made a mistake. This is important because the contracting officer in such cases actually suspects the *effect* of a mistake—an erroneous price—and does not suspect or surmise the *nature* of the mistake. Consequently, it is believed that the holding of the *Metro* case would be expressed more accurately by a statement that a request for verification is insufficient if the contracting officer fails to put the bidder on notice of the *reasons why a mistake is surmised*. Although this view has never been stated expressly by the Comptroller General, decisions of his office are consistent with the view. The most illustrative cases are those involving some type of "disparity." It is clear that the disparity between the low bid and the next low bid, the government estimate, or prior procurements is not of itself a mistake; it is merely the result of an erroneous price and the reason why a mistake is suspected. A request for verification was held inadequate, however, because the contracting officer failed to call the bidder's attention to the wide disparity between the amount of its bid and the disproportionately higher prices quoted by each of the other bidders for the same services.¹⁶⁰ The contracting officer's responsibility is well illustrated by a case in which the bid of the low responsive bidder was generally "in line" for the lowest quantity but was considerably lower with respect to the higher quantities. The Comptroller

¹⁵⁸ Unpub. Comp. Gen. B-144238, Oct. 28, 1960.

¹⁵⁹ 35 Comp. Gen. 136 (1955). This was the mistake which had been alleged by another bidder. The decision does not indicate that the contracting officer *actually* suspected the low bidder made a mistake. The decision, therefore, possibly implies that an allegation of a specific mistake by one bidder may put the contracting officer on notice of the *nature* of a possible mistake by another bidder which should be pointed out to such other bidder in requesting verification. In 37 Comp. Gen. 786, 788-89 (1958), the Comptroller General made this statement with respect to this case: "Our decision reported at 35 Comp. Gen. 136, is clearly distinguishable since, in that case, the contracting officer failed to put the bidder on notice of a specific mistake surmised as to the interpretation of the specifications of the invitation. . . ." Compare note 134 *supra* and accompanying text.

¹⁶⁰ Unpub. Comp. Gen. B-134428, Jan. 16, 1958. The basis of another decision, Unpub. Comp. Gen. B-129514, Nov. 29, 1956, is not clear, but the contracting officer's report to the Comptroller General recommended relief since the bidder was not specifically advised of the prices paid under two previous procurements. See also Unpub. Comp. Gen. B-137221, Sept. 8, 1958, which held the request for verification inadequate and suggested that the reason it was inadequate was because the bidder was not advised of the disparity between the low bid and last year's price for the same item.

General held that the request for verification was inadequate since the particular disparity was never specifically brought to the bidder's attention *even though the abstract of bids had been made available to the bidder for inspection*. It was stated:

When, as in this situation, the contracting officer suspects error he should specifically advise the bidder of the exact nature of the error suspected and request verification. When he fails to do so an attempted award on the basis of the bid as submitted containing the suspected error is invalid. . . .¹⁶¹

The view that it is the *reason* why the contracting officer suspects a mistake (rather than the mistake suspected) which should be pointed out to the bidder also is illustrated by cases holding that the request for verification was sufficient. For example, the request for verification was adequate in a situation in which the bidder (a dealer) was advised that his bid was lower than that of a manufacturer.¹⁶² Verification also was adequate in an instance in which the bidder was advised that its bid was so far below the next lowest bid as to raise a suspicion in the contracting officer's mind as to the possibility of mistake.¹⁶³

A contracting officer obviously cannot notify the bidder of a specific mistake surmised if he has no idea what the mistake may be; *i.e.*, if he merely surmises that some type of mistake may have been made. In such cases, the only possible way for a contracting officer to discharge his duty is to advise the bidder of the reason he suspects a mistake. This is illustrated by a case in which the contracting officer advised the low bidder that its bid was "considerably lower" than the next lowest bid and of its right to request relief because of a mistake in bid. The Comptroller General held that the contracting officer's notice to the bidder of the disparity in bids complied with the criteria of the *Metro* case since "*that was the full extent of the contracting officer's knowledge*, there being nothing in the invitation or bid from which he could have guessed at the nature or source of error."¹⁶⁴ (Emphasis added.) The emphasized language is an excellent "test" for compliance with the standard required by the *Metro* case. If the very purpose of the request for verification is to establish the good faith of the contracting officer, can the request itself be in

¹⁶¹ Unpub. Comp. Gen. B-142981, Dec. 6, 1960. In Unpub. Comp. Gen. B-144718, April 10, 1961, the request for verification was inadequate inasmuch as the contracting officer noted a disparity between low and next low bid on one of three items in the bid, but he merely requested the bidder to verify the total amount of the bid.

¹⁶² Unpub. Comp. Gen. B-145369, April 11, 1961.

¹⁶³ Unpub. Comp. Gen. B-147341, Nov. 7, 1961.

¹⁶⁴ 37 Comp. Gen. 786, 788 (1958).

good faith if less than a full disclosure is made to the bidder of all facts or circumstances which have led the contracting officer to suspect the possibility of error? The answer to this question is found in a recent case which held that a bidder is not given an opportunity in a "complete sense" to verify its bid unless the contracting officer brings "the entire factual situation" to the bidder's attention.¹⁶⁵ It is submitted that the appropriate test for the adequacy of a request for verification ordinarily is whether or not the bidder was put on notice of all facts or circumstances which suggested or should have suggested the possibility of mistake to the contracting officer.

In some circumstances, it has been held that the contracting officer's duty is not exhausted by compliance with the *Metro* standard. One line of decisions indicates that, in cases of obvious or suspected gross mistake, the contracting officer must do more than make a full disclosure to the bidder. One case indicates that, in such a situation, the request for verification should indicate clearly that the bidder has been requested to recheck the details and recompute its quotation.¹⁶⁶ The Comptroller General has also held a verification inadequate, even though the bidder was advised that its bid was extremely low, because the bidder was not "apprised of the fact that the disparity was so tremendous as to indicate a certainty that a gross error had been made in submitting the bid so that it would feel impelled to recompute its bid completely."¹⁶⁷ It was also held that a contracting officer should have requested "further clarification" prior to award and investigated the bidder's capabilities, even after verification, because the low bid was "completely out of line" with sixteen of the seventeen other bids received.¹⁶⁸ These cases are similar to the decisions indicating an acceptance is not in good faith, even after verification, if the contracting officer is still suspicious of error at the time of award.¹⁶⁹

¹⁶⁵ Unpub. Comp. Gen. B-149282, Aug. 7, 1962. See also Unpub. Comp. Gen. B-132076, June 27, 1957, in which it was stated that the Government, in requesting verification, "must give the bidder sufficient facts to put him on notice of the mistake surmised, if the subsequent acceptance of the bid is to result in a valid contract. . . ."

¹⁶⁶ Unpub. Comp. Gen. B-139435, May 14, 1959.

¹⁶⁷ Unpub. Comp. Gen. B-147090, Dec. 21, 1961. In Unpub. Comp. Gen. B-152604, Oct. 18, 1963, the Comptroller General held that "the contractor should have been advised before making the contract award that the disparity in bids [more than 50%] was so tremendous as to indicate a certainty that a gross error was made in its bid"

¹⁶⁸ Unpub. Comp. Gen. B-144300, Nov. 4, 1960.

¹⁶⁹ Unpub. Comp. Gen. B-144165, Oct. 12, 1960; Unpub. Comp. Gen. B-139435, May 14, 1959; 35 Comp. Gen. 136 (1955). In Unpub. Comp. Gen. B-129514, Nov. 29, 1956, the decision stated that the contracting officer, at the time of award, "apparently was not convinced" that the bidder understood the Government's requirements or the significance of the request for verification. This language certainly suggests that the contracting officer must take such action as may be necessary to impress upon the bidder the full implications of the verification of the bid. A recent decision, Unpub. Comp. Gen. B-152453,

D. Effect Of Adequate Verification

The legal effect of a bidder's verification usually depends, as discussed previously, upon the nature and content of the contracting officer's "request" for verification. The contracting officer must expressly disclose all facts to the bidder which may be suggestive of error. This requirement does not adversely affect the Government because the bidder cannot withdraw or change the bid without submitting satisfactory proof of a bona fide mistake. The Government's disclosure in a request for verification merely gives the bidder an opportunity to recheck its bid for mistake; it does not give the bidder an election to accept or reject the award.¹⁷⁰

If full disclosure is made to the bidder when verification is requested prior to award, the contracting officer generally cannot be charged later with acting in bad faith. In discussing the error detection duty of a contracting officer in one case, the Comptroller General stated:

Such duty was completely discharged when the contracting officer made inquiry of [the low bidder] as to the accuracy of his company's bid, pointing out the difference between the company's bid and the other two bids and the Government's estimate of the project, which amounts were given to the bidder; calling specific attention to the omission of item No. 21A on the Unit Price Schedule and advising him that the company would have to take that item at no charge, or that it could allege an error; and, also specifically calling attention to the company's low bid price of \$.55 per cubic yard for excavation for items Nos. 2, 3, 18, and 19, and 30, and requesting if that was the correct price. . . .¹⁷¹

A contracting officer who makes such a complete disclosure and who gives the bidder a reasonable time to verify the bid¹⁷² is under no obligation to make further inquiry as to the correctness of the bid unless he is still in fact suspicious of error. It is stated generally that the opportunity given to the bidder by an adequate request for verification precludes any assumption of bad faith or arbitrary action and that the contracting officer would be derelict in his duty if he failed thereafter to make the award to the low bidder.¹⁷³ If the contracting

Oct. 7, 1963, suggests that a contracting officer's duty is not discharged if, after verification, he still *should have been* suspicious of error. The Comptroller General held that the contracting officer "should have given the contractor a further opportunity to discover the error in its bid" although the contracting officer pointed out, in his initial request for verification, that the low bid was approximately 236 percent lower than the next low bidder.

¹⁷⁰ See note 184 *infra* and accompanying text.

¹⁷¹ Unpub. Comp. Gen. B-138798, March 16, 1959.

¹⁷² 37 Comp. Gen. 706 (1958).

¹⁷³ Unpub. Comp. Gen. B-151735, Sept. 11, 1963; Unpub. Comp. Gen. B-147341, Nov. 7, 1961; Unpub. Comp. Gen. B-145369, April 11, 1961; Unpub. Comp. Gen. B-144697, Jan. 24, 1961; 37 Comp. Gen. 786 (1958).

officer has completely discharged his duty prior to making the award, the contractor generally is thereby precluded from obtaining any relief based upon a mistake.

V. RELIEF

There are several unique rules relating to the relief available for mistakes made in connection with government contracts. These rules will be mentioned briefly in order that the contracting officer's duties may be considered within the proper framework and that proper emphasis be directed to when the error is alleged—before or after award.

A. Mistakes In Bids

If an error is alleged before award of the contract, relief may consist of either correction or withdrawal of the bid. In cases in which a bidder discovered and alleged a mistake before award, the courts have recognized that the bidder has a *right* to withdraw the bid, notwithstanding the general rule concerning withdrawal of bids.¹⁷⁴ The existence of a mistake necessarily must be proved prior to withdrawal or correction. However, only "reasonable proof"¹⁷⁵ of the existence of the mistake is necessary to justify withdrawal, and, as a practical matter, it may not even be necessary to meet this burden.¹⁷⁶ The Comptroller General has held that the disparity between the amounts of the low bid and the next low bid itself created a presumption¹⁷⁷ of error or is *prima facie* evidence of mistake.¹⁷⁸ It is clear, therefore, that a bidder who makes a bona fide mistake in its bid and alleges error before award should have little difficulty justifying the request for *with-*

¹⁷⁴ *United States v. Lipman*, 122 F. Supp. 284 (E.D. Pa. 1954); *Rhode Island Tool Co. v. United States*, 130 Ct. Cl. 698, 128 F. Supp. 417 (1955); *Alta Elec. & Mechanical Co. v. United States*, 90 Ct. Cl. 466 (1940). Compare Unpub. Comp. Gen. B-151424, June 21, 1963, in which it was stated, "[I]t has been a long-standing *practice* in federal procurement to permit withdrawal of a bid upon convincing proof of error therein." (Emphasis added.) For the general rule concerning withdrawal of bids, see note 19 *supra* and accompanying text.

¹⁷⁵ 35 Comp. Gen. 279, 281 (1955).

¹⁷⁶ See note 76 *supra* and accompanying text.

¹⁷⁷ 17 Comp. Gen. 575, 576 (1938).

¹⁷⁸ 17 Comp. Gen. 416, 418 (1937). In 28 Comp. Gen. 403 (1949), the disparity in bids alone was sufficient evidence of error to permit withdrawal. This type of proof seems to be based on "bootstrap logic"; *i.e.*, using the *fact* of the difference in price as proof of the *reason* for the difference in price. This type of proof, however, frequently is considered. See, *e.g.*, Unpub. Comp. Gen. B-144074, Oct. 4, 1960; Unpub. Comp. Gen. B-143995, Sept. 23, 1960; Unpub. Comp. Gen. B-138272, Jan. 19, 1959. The standards imposed by regulation require "clear and convincing" evidence of mistake in order for withdrawal to be authorized by the procuring agency. ASPR § 2-406.3(a)(1); FPR § 1-2.406-3(a)(1). This standard is difficult to reconcile with the position of the Comptroller General.

drawal of the bid. However, more difficulty is encountered in *correcting* an erroneous bid.

In order to justify correction of a bid, the existence of the mistake must be established and *conclusive* evidence submitted establishing the amount of the intended bid.¹⁷⁹ In addition, if the correction of the bid would affect the rights of other bidders—such as by displacing the low bidder—the amount of the intended bid must be ascertainable substantially from the invitation and the bid itself without resorting to work papers or other extraneous evidence.¹⁸⁰ The requirement for conclusive evidence of the amount of the intended bid is reasonable. If a bidder is permitted to withdraw his bid, all other bidders remain in the same position in which they would have been if such bidder never had submitted a bid. Correction of a bid, if permitted upon less than conclusive evidence of the amount of the intended bid, could seriously compromise the integrity of the competitive bidding system and would certainly open the door to fraud.

The matter of correcting a bid raises a problem relating to the nature of the mistake that is unique in government contract law. The problem is this: can a bid which is not *responsive*¹⁸¹ to the invitation be corrected based upon an allegation that the reason for the bid being nonresponsive was an oversight or a mistake? The Comptroller General's position is that it cannot, and his reason is as follows:

It is probable that the majority of unresponsive bids are due to oversight or error, such as the failure to quote a price, to sign the bid, to furnish a bid bond, to submit required samples or data, or the submission of the wrong sample, incomplete data, or statements the actual meaning of which was not intended, etc. An unresponsive bid does not constitute an offer which may properly be accepted, and to permit a bidder to make his bid responsive by changing, adding to, or deleting a material part of the bid on the basis of an error alleged after opening would be tantamount to permitting a bidder to submit a new bid. . . .¹⁸²

Consequently, it is now settled that an allegation of error properly may be considered only in cases in which the bid is responsive to the invitation and is otherwise proper for acceptance.¹⁸³

¹⁷⁹ 35 Comp. Gen. 279, 281 (1955). In 38 Comp. Gen. 76, 78 (1958), the Comptroller General said that correction has been permitted only if the evidence submitted establishes "beyond all doubt" the actual intention of the bidder. In these circumstances, it seems that the "clear and convincing" evidence requirement in the regulation is less than the degree of proof required by the Comptroller General. See note 178 *supra*.

¹⁸⁰ 37 Comp. Gen. 210 (1957). This requirement also is imposed by regulation for administrative determinations. ASPR § 2-406.3(a)(3); FPR § 1-2.406-3(a)(2).

¹⁸¹ See note 25 *supra* and accompanying text.

¹⁸² 38 Comp. Gen. 819, 821 (1959).

¹⁸³ Unpub. Comp. Gen. B-147884, Aug. 8, 1962; 40 Comp. Gen. 432 (1961); 40 Comp. Gen. 132 (1960); 38 Comp. Gen. 819 (1959).

A recent case raised another unique problem: if a bidder alleges and establishes that its bid contains an error, but is unable to prove the amount of the intended bid in order to warrant correction, can the bidder thereafter "waive" its right to withdraw the bid and receive the award? The Comptroller General held that such right could not be waived and that the bid properly should be disregarded in making the award.¹⁸⁴ The basis of the decision was that it would be unfair to other bidders to permit a low bidder to receive the award after an unsuccessful attempt to obtain an increase in price by reason of mistake. It was stated, however, that such action would not be prejudicial to other bidders provided the evidence is clear and convincing that the low bidder would have remained low if the mistake had not been made.

B. Mistakes In Contracts

If allegation of error is not made until after the contract has been awarded, the form of relief available to the contractor is, generally, either correction of the error or cancellation of the contractor's obligation. The discussion in this part will cover several important limitations with respect to relief available for mistakes in contracts. One initial matter should be mentioned; statements frequently are found in decisions indicating that the bidder's carelessness or negligence in computing the bid precludes any relief for mistake.¹⁸⁵ It is submitted that such statements should be inapplicable to mistake cases in government contract law. There usually is some degree of negligence or carelessness involved in every mistake, and a criterion based upon the relative quantity or degree of negligence is highly impractical. Moreover, any such limitation is inconsistent with the fault concept of relief for mistakes in government contracts; that is, there is no basis logically for denying relief because of carelessness if the contracting officer is presumed in law to have acted in bad faith and sought to take advantage of the bidder.

One important problem concerns the contractor's execution of a formal contract or performance after allegation of error as affecting the contractor's right to relief for mistake. Many cases suggest that

¹⁸⁴ Unpub. Comp. Gen. B-151424, June 21, 1963. See also Unpub. Comp. Gen. B-151534, June 14, 1963, in which a bidder's protest of the rejection of its bid, after a determination was made that the evidence did not warrant correction, was denied. Compare 35 Comp. Gen. 363 (1955) (sales case) which held that the bid could be corrected, since the error and the intended bid were established, but that the bidder had no right to *withdraw* its bid.

¹⁸⁵ See, e.g., *Hyde Park Clothes, Inc. v. United States*, 114 Ct. Cl. 424, 84 F. Supp. 589 (1949); *Massman Constr. Co. v. United States*, 102 Ct. Cl. 699, 60 F. Supp. 635, cert. denied, 325 U.S. 866 (1945); *Nason Coal Co. v. United States*, 64 Ct. Cl. 526 (1928); Unpub. Comp. Gen. B-134591, Dec. 23, 1957.

such action precludes any relief for mistake,¹⁸⁶ but other cases suggest to the contrary.¹⁸⁷ In the present state of the law, a contractor takes a substantial risk in undertaking or continuing performance of a contract after error has been discovered and alleged. There is an exception, however, if the contracting officer assures the contractor that the bid will be corrected.¹⁸⁸ This writer believes that any limitation upon the available relief for mistakes because of execution or performance of the contract is both inappropriate and unnecessary. It is inappropriate since it tends to encourage—indeed, compel—contractors to delay performance until the legal issues are resolved, and such delays are not in the public interest if they are unnecessary to protect the Government's rights. The delays are unnecessary in view of the other limitations discussed hereafter. An acceptable rationale, it is suggested, would be that the contracting officer's insistence upon performance and delivery after allegation of error is *coercive* and should not bar relief if it is subsequently determined that the contractor would have been legally justified in refusing to perform.¹⁸⁹

¹⁸⁶ Board of Trustees of Nat'l Training School for Boys v. O.D. Wilson Co., 133 F.2d 399 (D.C. Cir. 1943); Massman Constr. Co. v. United States, *supra* note 185; Unpub. Comp. Gen. B-146386, Sept. 28, 1961; 39 Comp. Gen. 27 (1959); 38 Comp. Gen. 218 (1958); Unpub. Comp. Gen. B-134166, Nov. 27, 1957; 36 Comp. Gen. 191 (1956); 31 Comp. Gen. 384 (1952); 26 Comp. Gen. 426 (1946); 25 Comp. Gen. 536 (1946).

¹⁸⁷ C.N. Monroe Mfg. Co. v. United States, 143 F. Supp. 449 (E.D. Mich. 1956); Rhode Island Tool Co. v. United States, 130 Ct. Cl. 698, 128 F. Supp. 417 (1955); Unpub. Comp. Gen. B-147090, Dec. 21, 1961 (performance and execution of a supplemental agreement); Unpub. Comp. Gen. B-146124, Sept. 1, 1961; Unpub. Comp. Gen. B-146413, Aug. 1, 1961; 38 Comp. Gen. 504 (1959); Unpub. Comp. Gen. B-138272, Jan. 19, 1959; Unpub. Comp. Gen. B-135594, April 3, 1958.

¹⁸⁸ In Edmund J. Rappoli Co. v. United States, 98 Ct. Cl. 499 (1943), the court held that the signing of the contract did not preclude relief for a mistake previously made if the contracting officer assured the bidder that the mistake "could be corrected" if submitted through proper channels. The court, in effect, enforced the Government's promise to correct the mistake.

¹⁸⁹ See Albert & Harrison, Inc. v. United States, 107 Ct. Cl. 292, 68 F. Supp. 732 (1946), *cert. denied*, 331 U.S. 810 (1947), in which the court held that action of the Government in threatening to forfeit the bid bond if the bidder failed to sign the contract was coercive in a situation in which the Government had no *right* to have the bidder sign the contract. See also Russ Mitchell, Inc. v. United States, 121 Ct. Cl. 582 (1952). In one decision, the Comptroller General said that a claim for mistake should not be denied because of execution and performance of the contract since the contractor "was influenced in his decision to accept the contract by the advice given by [the contracting officer] that withdrawal of the bid would result in the forfeiture of the bid bond. . . ." 38 Comp. Gen. 678, 684 (1959) (Emphasis added.) This situation is somewhat analogous to the controversy in Dillon v. United States, 140 Ct. Cl. 508, 156 F. Supp. 719 (1957). In that case, the contractor had sought to be relieved from contract performance because of severe weather conditions, but the contracting officer insisted upon performance and advised the contractor that he would be charged with the excess cost upon reprourement if it became necessary to terminate for default. The court granted relief to the contractor for the additional cost incurred in performance, stating:

The choice which the contracting officer gave [plaintiffs] was somewhat like the choice sometimes given the cattle thief who might be captured by a group of

In any event, performance and delivery prior to the discovery of error should not affect relief.

The Comptroller General has expressed in several cases that a contract price may be increased by correction of a mistake only if the amount the bidder actually intended to bid can be ascertained; in other words, a bidder cannot be permitted to recalculate and change his bid to include factors which he did not have in mind when his bid was submitted or as to which he has since changed his mind.¹⁹⁰ It has been stated, "[T]o permit this would reduce to a mockery the procedure of competitive bidding required by law in the letting of public contracts."¹⁹¹ Although this reasoning undoubtedly is sound as applied to mistakes in bids, it is highly questionable if applied to correction of a bid after the contract has been awarded. Moreover, it is illogical to prohibit an increase in the price for prospective application yet permit such increase to be made retroactively, in effect, by authorizing relief after performance on the basis of unjust enrichment.¹⁹² It certainly does not seem in the best interest of the Government to require cancellation, and thus presumably incur cost of reprocurement, merely because a fair price to the contractor may require the inclusion of elements of cost which were not considered at the time the bid was submitted. It would seem that the interest of the Government is protected adequately by the following limitation.

Another limitation frequently applied to relief in mistake cases is that the total amount recovered by the contractor may not exceed the amount of the next low correct bid.¹⁹³ The Comptroller General's basis for this limitation is as follows:

The rationale for limiting relief to the next lowest correct bid is that the contracting officer is bound by mandatory provisions of law . . . to make the award to the lowest responsible bidder and, therefore, had no authority to bind the Government to other than the lowest correct bid price received.¹⁹⁴

citizens on the frontier in the early days. The story goes that one such rustler was taken in the act. The enraged owners gave him the choice of whether he be 'hung or shot.' After studying the matter over, he replied that he could not develop any enthusiasm for either method." *Id.* at 511-12, 156 F. Supp. at 721.

¹⁹⁰ Unpub. Comp. Gen. B-148481, April 3, 1962; 37 Comp. Gen. 706 (1958); 17 Comp. Gen. 575 (1938).

¹⁹¹ 17 Comp. Gen. 575, 577 (1938).

¹⁹² See, e.g., *C.N. Monroe Mfg. Co. v. United States*, 143 F. Supp. 449 (E.D. Mich. 1956); *Rhode Island Tool Co. v. United States*, 130 Ct. Cl. 698, 128 F. Supp. 417 (1955); Unpub. Comp. Gen. B-145142, March 16, 1961 (restitution after rescission on basis of the reasonable value of full performance); 38 Comp. Gen. 504 (1959).

¹⁹³ *Rhode Island Tool Co. v. United States*, *supra* note 192; Unpub. Comp. Gen. B-150707, April 15, 1963; Unpub. Gen. B-149283, Dec. 26, 1962; 37 Comp. Gen. 685 (1958).

¹⁹⁴ 37 Comp. Gen. 685, 686 (1958).

One weakness of this argument is that the provision of law requiring that award be made to the lowest responsible bidder¹⁹⁵ is not conditioned upon the bid being *correct*; therefore, the same reasoning would support an argument that relief could never be granted for mistake since the contracting officer has no authority to bind the Government in an amount in excess of the low bid, even if such bid were erroneous. In view of the basic theory for any relief—that the contracting officer acted in bad faith and sought to take advantage of the bidder—it would seem that the primary consideration should be that the contractor receive a fair price for the goods or services. Of course, the amount of the next lowest bid usually would be the best measure of a fair price. Thus, it is believed that the next low bid more properly should be used as a *measure* of, rather than a limitation upon, relief.¹⁹⁶

Brief mention should be made of one additional category of cases involving relief for mistakes. These cases involve situations in which the contracting officer completely discharged any responsibility he may have had to the contractor, but relief is permitted, nevertheless, on the basis of hardship or that it would be unconscionable to require performance. As stated by the Court of Claims:

[T]he general rule is that difficulty of performance or losses in carrying out a contract will not be treated as a basis for relief by the courts But in extraordinary cases where extreme hardship, unforeseen and not contemplated by either party, would necessarily result, a measure of relief may be granted if the unusual circumstances justify such action. This is the very essence of equity¹⁹⁷

Although the Comptroller General often states that he has no authority to grant relief on this basis,¹⁹⁸ he frequently does.¹⁹⁹

¹⁹⁵ See note 24 *supra*.

¹⁹⁶ *Accord*, C.N. Monroe Mfg. Co. v. United States, 143 F. Supp. 449 (E.D. Mich. 1956); *Shepard v. United States*, 95 Ct. Cl. 407 (1942). This position is also consistent with the cases in which the Comptroller General has authorized relief *in excess* of the next low bid. See, e.g., Unpub. Comp. Gen. B-137297, Oct. 8, 1958.

¹⁹⁷ *Dillon v. United States*, 140 Ct. Cl. 508, 512-13, 156 F. Supp. 719, 722 (1957). This case, however, did not involve a mistake by the contractor; the contract was for supplying hay to the Government and the hardship resulted from a severe drought.

¹⁹⁸ See, e.g., Unpub. Comp. Gen. B-144251, Oct. 28, 1960; Unpub. Comp. Gen. B-142981, July 13, 1960.

¹⁹⁹ Unpub. Comp. Gen. B-150382, Feb. 20, 1963; Unpub. Comp. Gen. B-148775, July 24, 1962; Unpub. Comp. Gen. B-146413, Aug. 1, 1961; Unpub. Comp. Gen. B-145806, June 12, 1961; see also Unpub. Comp. Gen. B-144300, Nov. 4, 1960; Unpub. Comp. Gen. B-143861, Sept. 16, 1960. In Unpub. Comp. Gen. B-152453, Oct. 7, 1963, it was stated: "It would not only be inequitable to require performance at the contract price but it could also be seriously contended that it would be unconscionable to do so."

VI. CONCLUSION

Contracting officers should be held to high standards in the exercise of their obligation to examine bids for errors and obtain a verification if the possibility of error is suspected. This is desirable from a standpoint of federal procurement policy as well as for reasons of fairness to bidders. The contracting officer's error detection duty must be exercised, if at all, prior to award of the contract, and the chances of an allegation of error subsequent to award are reduced appreciably if prior to award the contracting officer makes a full and frank disclosure to the bidder of all factors which may suggest the possibility of error. It is certainly to the advantage of both the Government and the bidders if an allegation of error can be considered and resolved before award and thus before either party has changed positions. In addition, the equities involved in requiring the mistaken party to assume the risk of mistake in government contract law are quite different from the circumstances in the law of private contracts.²⁰⁰ In view of the possible financial detriment to a bidder who has made a mistake, the burden placed upon a contracting officer by his error detection responsibilities is insignificant, and strict enforcement of such error detection duty is justified. This is particularly true because the duty can be discharged completely in most situations merely by an adequate request for verification of the bid.

The principles applied in the decisions of the Comptroller General in mistake cases are consistent with a requirement of high standards for contracting officers in the exercise of their error detection duty. However, the application of these principles to specific factual situations in such decisions is not always consistent with such a requirement. This result is at least partially attributable to what may be termed a "subjective" approach with respect to the contracting officer's report; namely, the consideration given to the con-

²⁰⁰ Government contracts have been classified as an excellent example of a "contract of adhesion," (Whelan & Pearson, *Underlying Values in Government Contracts*, 10 J. Pub. L. 298, 331-32 (1962)); that is, an agreement drafted by a dominant party and presented to a weaker party as the only acceptable instrument (Shuchman, *Consumer Credit by Adhesion Contracts*, 35 Temp. L.Q. 125, 128 (1962)). The favored position of the Government in contract, as compared with a private citizen, is illustrated by such standard government contract clauses as "Changes," "Default," "Disputes," "Suspension of Work," and "Termination for Convenience." In addition, legal doctrines such as estoppel, apparent authority, and laches may not be applied against the Government in the same manner that they are applied against individuals. Not only does the Government have sovereign immunity from suit (except in those instances and to the extent it has consented to be sued), but it also has successfully defended suits for breach of contract on the basis that the actions complained of were taken by the Government in its "sovereign" rather than its contractual capacity. It should also be observed in this connection that the profits of one party are not subject to "renegotiation" after performance under the law of private contracts.

tracting officer's conclusion concerning whether or not he was on constructive notice of error at the time of award.²⁰¹ It is suggested that such an approach is analogous to considering the opinion of a defendant in a tort case on the question of negligence. The contracting officer's statement of whether or not he was *in fact* suspicious of error at the time of award is most important, but a determination of whether or not he *should have been* suspicious of error properly is made upon consideration of the facts and circumstances—an "objective" approach—and not upon consideration of the contracting officer's opinion.

In closing, it should be observed that the federal common law relating to mistakes in government contracts has developed rapidly in the last few years. It is extremely doubtful that some of the older court decisions based upon the harsh no-duty-to-nursemaid-bidders concept would be decided with the same result today. Nevertheless, these decisions remain as obstacles to further progress and development in this field. There could be no more appropriate time than the present for one or more scholarly and analytical court opinions in this area.

²⁰¹ An example of statements frequently found in decisions of the Comptroller General is as follows: "It was stated in the letter of July 27, 1962, that the Contracting Officer did not believe that the low bid was so out of line with the other bids as to constitute constructive notice of error requiring him to request verification before award. . . ." Unpub. Comp. Gen. B-149574, Aug. 24, 1962. Similarly, in another decision it was said: "[T]he contracting officer has stated that he did not notice anything about the bid which would indicate that an error might have been made." Unpub. Comp. Gen. B-148726, May 22, 1962. It is certainly objectionable to give any weight to such a conclusion as a basis for denying relief. In fairness, however, it should be noted that the Comptroller General also has used the contracting officer's conclusion as a basis for granting relief. In Unpub. Comp. Gen. B-148120, Feb. 27, 1962, it was stated: "In view of the contracting officer's statement that he feels that he had constructive notice of a mistake in the contractor's bid prior to award, the contracting officer should have requested [the low bidder] to verify its bid prior to award."